89-447

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

EVELYN PENCE

Petitioner

vs.

BOARD OF COUNTY COMMISSIONERS,
OF HAMILTON COUNTY, OHIO, ET AL.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE FIRST APPELLATE DISTRICT OF OHIO

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57pp

QUESTION PRESENTED FOR REVIEW

May the Due Process claims of a murdered prison guard, brought under 42 U.S.C. § 1983 against a County government and its officials, be dismissed by a state court via summary judgment on the ground that the facts showed only a "lack of due care", when the record contained substantial, uncontradicted evidence not only that the County was deliberately indifferent to dangerous and substandard prison conditions, but that the County actually enforced a policy and custom of providing metal materials to violent inmates, with full knowledge that inmates would convert the metal into deadly weapons and that injury or death to prison inmates or guards was substantially certain to occur?

PARTIES

PETITIONER (PLAINTIFF/APPELLANT in the First Appellate District of Ohio)

Evelyn Pence, as Personal Representative and Administratrix of the Estate of Philip J. Pence, deceased.

RESPONDENTS (DEFENDANTS/APPELLEES in the First Appellate District of Ohio)

1) Board of County Commissioners of Hamilton County, Ohio
2) Hamilton County, Ohio
3) Lincoln J. Stokes, Sheriff of Hamilton County, Ohio
4) Victor Carelli, Chief Deputy Sheriff of Hamilton County, Ohio
5) Michael Montgomery, Director of Corrections, Community Correctional Institute
6) William A. Withworth, Superintendent, Community Correctional Institution
7) Stanley Grothaus, Department Superintendent, Community Correctional Institution
8) Robert Brockemeyer, Chief of Security, Community Correctional Institution
9) James York, Supervisor, Community Correctional Institution
10) The Cincinnati Insurance Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

United States Constitution

Miscellaneous Authorities

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PETITION FOR A WRIT OF CERTIORARI TO THE FIRST APPELLATE DISTRICT OF OHIO

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner Evelyn Pence respectfully prays that a writ of certiorari issue to review the judgment of the First District Court of Appeals of Ohio.

OPINIONS BELOW

The opinion of the First Appellate District of Ohio is unreported and appears in the Appendix hereto, page 2a. The entry of the Supreme Court of Ohio, denying review of the decision of the First Appellate District was unreported and appears in the Appendix hereto, page 1a.

JURISDICTION

The decision of the First Appellate District of Ohio was entered on February 15, 1989. The entry of the Supreme

Court of Ohio denying review of the decision of the First Appellate District was entered on June 7, 1989 and this petition was filed within ninety (90) days of that date. The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT XIV

Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE, Title 42; Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation or any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia, shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Statement Of The Facts

The Community Correctional Institution ("CCI") is a correctional facility housing violent criminals in Hamilton County, Ohio. Pursuant to a contract with the City of Cincinnati, Hamilton County assumed full ownership, operation and control of CCI in 1981. The Hamilton County Sheriff's Office provided the manpower to guard and manage CCI. Petitioner's decedent, Phillip J. Pence, worked for the Hamilton County Sheriff's Office at CCI as a prison guard until he was violently murdered by a CCI inmate on June 9, 1984. [Hamilton County, its officials and Board of County Commissioners, and the CCI supervisors who are parties to this action will hereinafter be referred to collectively as "Respondents".]

For years prior to June 9, 1984, Respondents had knowledge that dangerous and life-threatening conditions existed at CCI. Sharp metal material was readily available to inmates from two different sources there. One source was old chain-link fencing located throughout the grounds, from which metal material was easily removed by inmates. The other source was metal handles actually provided by Respondents to inmates with buckets for overnight toilet purposes. Metal from both sources was routinely fashioned into sharp lethal weapons ("shanks") by the CCI inmates. This practice was so common that CCI guards would discover as many as four or five shanks per day in the possession of the inmates. In spite of repeated employee complaints about the availability of the deadly weapons to violent criminals, Respondents took no remedial action. Rather, when Respondents discovered buckets without handles, they ordered prison guards to provide additional metal handles to the inmates. Moreover, when guards, in fear for their safety, took the initiative to remove handles from buckets prior to distribution, Respondents ordered replacement of the metal handles. This practice and policy, for which Respondents were solely responsible, continued in spite of Respondents' actual knowledge that inmates would convert the metal into

deadly shanks. In addition to the practices and policy just described, Respondents operated CCI with other significant safety hazards, many of which constituted violations of Ohio law and federal prison guidelines. [See affidavit of expert witness Ken Katsaris, Appendix p. 14a.]

On June 9, 1984, Respondents were warned as early as 4:00 p.m. that inmate William Zuern ("Zuern") may have possessed one of the deadly shanks. However, no search was ordered for Zuern's cell until 10:00 p.m. No written procedures were provided to CCI guards for properly searching a cell, and Phillip Pence was given no specific instructions regarding the search of Zuern's cell on June 9, 1984. Shortly after Pence and another prison guard opened Zuern's cell door, Zuern lunged at Pence and stabbed him in the chest with a metal shank. Pence, who was 26 years old at the time of the stabbing, died within one hour.

B. History of Proceedings and Federal Questions Raised by Petitioner.

On May 30, 1985, Petitioner Evelyn Pence ("Petitioner") filed a Complaint in Hamilton County (Ohio) Court of Common Pleas on her own behalf and as Personal Representative and Administratrix of the Estate of Phillip Pence. Petitioner based her complaint on several state law claims, as well as a claim that Respondents had deprived Phillip Pence of life and liberty without due process of law, in violation of 42 U.S.C. § 1983. Petitioner specifically alleged a breach of duty in her complaint. Respondents filed a joint Motion for Summary Judgment in October 1986, which was granted by the Trial Court on January 29, 1988. The Trial Court found that the Respondents were immune from liability on the state law claims under the Worker's Compensation laws in Ohio. The Trial Court's short opinion failed to address Petitioner's federal § 1983 claims. (Appendix, page 11a.)

On February 1, 1988, Petitioner appealed the Trial Court's judgment to the First Appellate District (Hamilton County) of Ohio. Petitioner stated her Fourth Assignment of Error as follows:

THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT, IN GRANTING APPELLEES' MOTION FOR SUMMARY JUDGMENT ON THE CAUSE OF ACTION EXISTING UNDER 42 U.S.C., § 1983.

After briefing and oral argument, the First Appellate District affirmed the Trial Court's judgment on February 15, 1989, while devoting less than ten lines of its opinion to the dismissal of Petitioner's § 1983 claim. The Court concluded that Summary Judgment in favor of Respondents was proper because their conduct amounted at most to a lack of due care, which does not state a Due Process claim under 42 U.S.C. § 1983. (Appendix, page 7a, 8a)

On April 10, 1989, petitioner filed a Memorandum in Support of Jurisdiction with the Supreme Court of Ohio, seeking review of both the state law claims and the federal § 1983 claim. Petitioner stated the following proposition of law for consideration by the Supreme Court of Ohio:

PROPOSITION OF LAW NO. 4:

WHEN COUNTY OFFICIALS KNOWINGLY ESTABLISH OR DISREGARD POLICIES AND CUSTOMS WHICH CREATE AN UNSAFE WORK ENVIRONMENT FOR PRISON GUARDS IN A COUNTY CORRECTIONAL FACILITY AND WHICH REFLECT EITHER GROSS NEGLIGENCE, RECKLESSNESS, OR DELIBERATE INDIFFERENCE TO THE SAFETY OF THE PRISON GUARDS, A PRISON GUARDS'S DEATH RESULTING FROM THAT UNSAFE ENVIRONMENT GIVES RISE TO A SUBSTANTIVE DUE PROCESS VIOLATION ACTIONABLE UNDER 42 U.S.C. § 1983.

After an opposing memorandum was filed by Respondents on May 5, 1989, the Supreme Court of Ohio dismissed Petitioner's appeal on June 7, 1989 for the reason that no substantial constitutional question existed therein. (Appendix, page 1a)

REASONS FOR GRANTING THE WRIT

I. DEFINING THE LIMITS OF SUMMARY JUDGMENT

The question presented for review actually has two components: A procedural question arising from the state court's use of summary judgment, and the substantive question of whether a substantive due process violation has occurred.

From a procedural standpoint, this Court should grant this writ to define the limits which bind state courts in disposing of meritorious federal civil rights claims by summary judgment. Specifically, this case involves a state court's ultimate conclusion that Petitioner failed in her claim under 42 U.S.C. § 1983 and the Due Process Clause of the Fourteenth Amendment because the evidence supported nothing more than a "lack of due care". By evaluating evidence in this manner, purportedly construed most favorably to Petitioner, the Ohio First District Court of Appeals managed to insulate Respondents from liability when, by any objective standard, Respondents' conduct was sufficiently conscience-shocking and abusive to create a fact issue for trial.

Petitioner is well aware that it is the exception, rather than the rule, for this Court to undertake a review of evidentiary findings. However, when important federal rights are at stake, this Court has historically approached such review as a duty. "[T]his Court will review the finding of facts by a state court where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze facts." *Fiske* v. *Kansas*, 274 U.S. 380, 47 S.Ct. 655, 71 L.Ed.2d 380 (1927). "The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on our solemn responsibility for maintaining the constitution inviolate." *Napue* v. *Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). "When a Federal right has been

specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in expressed terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a Federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the Federal right may be assured." *Norris* v. *Alabama*, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed.2d 1074 (1935).

Petitioner submits that there is compelling evidence in this record to support the allegations that Respondents breached their duty to Phillip Pence because of conduct rising at least to deliberate indifference and possibly to willful intent to endanger the life of Phillip Pence. In addition to expert Ken Katsaris' opinion that conditions at CCI created a substantial certainty that injury or death would occur, and that the deliberate acceptance of such conditions directly caused the death of Phillip Pence, the record also contains no less than eight corroborative depositions of CCI employees and supervisors, including some of the Respondents herein, which uniformly support Petitioner's factual allegations. Specifically, the depositions document beyond any doubt that material for weapons was readily available and even provided to inmates on a daily basis, that everyone at CCI was aware of this practice and the existence of weapons, that prison guards routinely found shanks and turned them into CCI supervisors, and that Respondents took no steps to eliminate the dangerous conditions created and perpetuated by their own policies and customs.

When this evidence is construed most favorably to Petitioner, there is, by any objective standard, a fact issue as to whether Respondents caused the death of Phillip Pence with their gross negligence, deliberate indifference, or willful intent. Both the Trial Court and the First Appellate District

held that the evidence in this case did not reach the level of intent required to pierce Respondents' immunity under Ohio's Workers' Compensation laws, and that conclusion of state law is not for this Court to review. However, in light of this Court's assertion that "[Section 1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions" *Monroe* v. *Pape*, 365 U.S. 167, 187, 81 S.Ct. 473, 484, 5 L.Ed. 2d 492 (1961), it is instructive to consider relevant language from the area of tort law in deciding whether the Ohio courts acted properly in dismissing Petitioner's federal claims as well:

> "All consequences which the actor desires to bring about are intended. . . . Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result."

Restatement of the Law 2d, Torts (1965), Section 8(A), comment b. Petitioner's expert testimony that the conditions at CCI created a substantial certainty of injury or death, along with multiple corroborative depositions to the effect that Respondents were fully aware of these dangers and actively perpetuated them, certainly precludes a dismissal by summary judgment. Should this Court deny this writ and allow the decision of the First District Court of Appeals to stand, it would send a message that state courts can circumvent the clear legislative intent of 42 U.S.C. § 1983 and protect county governments and municipalities from liability by making unsupportable evaluations of factual evidence to summarily dispose of meritorious federal claims. Aside from creating an environment in state courts where civil rights would not be protected, such a decision may create the long range effect of deterring future plaintiffs from bringing valid civil rights claims to the state courts, thereby shifting an even greater burden to the federal courts.

In addressing the proper standard for granting summary judgment, this Court has previously stated that "Where the record as a whole could not lead a rational trier of fact to find for the non-moving party, there is 'no genuine issue for trial' ". *Matsushita Elec. Indus. Co.* v. *Zenith Radio*, 475 U.S. 560, 89 L.Ed. 538, 552 (1986). Certainly a trier of fact would not be deemed irrational if, in this case, he had concluded that Respondents' conduct was shocking and created a genuine issue regarding gross negligence or deliberate indifference. Indeed, it seems irrational not to conclude that Respondents exhibited a deliberate indifference to a known life-threatening risk, which Respondents themselves had created and perpetuated.

II. SUBSTANTIVE DUE PROCESS

A. The Gray Area Between Negligence and Intent.

A second compelling reason for granting this writ is that this Court has never directly addressed the issue of substantive due process violations for conduct which goes beyond mere negligence. The First District Court of Appeals relied on *Davidson* v. *Cannon*, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986) to dismiss Petitioner's claims below. The *Davidson* case clearly established that mere negligence does not trigger the due process clause for purposes of § 1983. However, in *Daniels* v. *Williams*, 474 U.S. 327, 333, 106 S.Ct. 662, 666, n.3, 88 L.Ed. 2d 662 (1986) the Court, in an oft-quoted footnote, specifically declined to consider "whether something less than intentional conduct, such as recklessness or 'gross negligence', is enough to trigger the protections of the Due Process clause." In the absence of this Court's definitive authority, it is widely accepted in the Federal Circuits that varying degrees of conduct in excess of mere negligence is sufficient to create a substantive due process violation: *Nishiyama* v. *Dickson County, Tennessee*, 814 F.2d 277 (6th Cir. 1987) ("gross negligence" found to be a sufficiently arbitrary use of governmental power to trigger a substantive due process violation under the Fourteenth Amendment); *Taylor* v. *Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (allegation of "deliberate indifference" states a constitutional claim for deprivation of liberty interest); *White* v. *Rochford*, 592 F.2d 381 (7th Cir. 1979) ("It is clearly established that [state officials] may be held liable for 'gross negligence' or 'reckless disregard' for the safety of others.")

B. Duty to Protect.

This case also presents an important secondary issue not yet addressed by this Court relative to substantive due process. Specifically, this case presents unique facts for determining exactly when the state owes a duty to protect an individual from the violent acts of a third party. In *Martinez* v. *California*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed. 2d 481 (1980), this

Court implied that under special circumstances a duty may be imposed on a state to protect an individual from third party violence. At one end of the spectrum are cases such as *Martinez* and *DeShaney* v. *Winnebago County Dept. of Social Services*, ____ U.S. ____, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), wherein this Court has affirmed that the state generally owes no duty to defend or protect an individual against private violence. At the other end are cases recognizing the duty to protect and care for individuals who are involuntarily confined by the state. *Youngberg* v. *Romeo*, 457 U.S. 307 (1982); *Revere* v. *Massachusetts General Hospital*, 463 U.S. 239 (1983). The facts of this case fall somewhere in between, but case law from two federal circuits strongly suggests that Respondents owed such a duty to Phillip Pence.

Most directly on point is *Nishiyama*, supra, wherein the Sixth Circuit reversed a Rule 12(B)(6) dismissal by the District Court and held that § 1983 liability may be attributable to the State for the violent acts of a prison inmate, where the inmate remained under the control of the state and the state actually provided to the inmate the means (a fully equipped police car) with which to commit the crime. "None of the cases following *Martinez* contains a similarly close relationship between the criminal acts and the defendants' acts under color of law." 814 F.2d at 281. If anything, the facts in this case are even more flagrant that those in *Nishiyama*, as Respondents made a policy of placing weapons into the hands of the inmates on a daily basis, and prohibited the employees from taking protective action.

Somewhat more speculative is the language in *Ellsworth* v. *City of Racine*, 774 F.2d 182 (7th Cir. 1985), wherein the Seventh Circuit focused not on the relationship between the state and the criminal act, but rather on the special relationship between the state and its employees:

> There may be situations when a municipal employee and the municipality have, by virtue of the employment relationship, a special relationship for purposes of § 1983. In that case, the municipality would have a constitutional

> duty to provide elementary protective services to the employee. Thus, we in no way want to immunize municipalities from liability for duties they breach.

While he was not as helplessly confined as prison inmates or others who are involuntarily restrained, Phillip Pence certainly had a more direct relationship with the state than do members of the general public. As a state employee performing a role essential to the administration of criminal justice, yet facing the day-to-day dangers of the prison environment, Phillip Pence had the right to expect his County employer not to actively contribute to his death. The United States Court of Appeals for the First Circuit, for example, has suggested that a special relationship implicates the Fourteenth Amendment "when the state, by exercising custody or control over the plaintiff, effectively strips her of her capacity to defend herself, or affirmatively places her in a position of danger that she would not otherwise have been in." *Estate of Gilmore* v. *Buckley*, 787 F.2d 714, 722 (1st Cir. 1986). There is simply overwhelming evidence in this record to support a finding that Respondents were directly responsible for endangering the life of Phillip Pence, in the context of the employer-employee relationship wherein Respondents controlled and directed Pence's conduct and enforced policies which prohibited him from taking measures to protect himself.

Accordingly, there are two special relationships in this case which independently created a duty on the part of Respondents to protect Phillip Pence: The custodial relationship wherein Respondents failed to control a violent inmate (Zuern) and ultimately assisted him in the killing of Phillip Pence, and the employment relationship between Respondents and Phillip Pence wherein Respondents failed in their duty to provide a safe work environment.

In light of the speculation and uncertainty which is evident in the federal circuits as they grope for the proper standards governing substantive due process violations, and in light of the dubious use of summary judgment by the Ohio court in

this case to insulate Respondents from liability in the aftermath of their conscience-shocking conduct, Petitioner respectfully suggests that federal and state courts alike would greatly benefit from further guidance by this Court regarding these heavily litigated civil rights issues.

CONCLUSION

Based upon the foregoing, a writ of certiorari should issue to review the judgment of the First Appellate District of Ohio.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX

THE SUPREME COURT OF OHIO
1989 TERM

Case No. 89-591

EVELYN PENCE, ETC.,

Appellant,

v.

BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY ET AL.,

Appellees.

ENTRY

To wit: June 7, 1989

Upon consideration of the motion for an order directing the Court of Appeals for Hamilton County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $20.00, paid by Condit & Dressing.
(Court of Appeals No. C880080)

/s/ THOMAS J. MOYER
Chief Justice

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

APPEAL NO. C-880080
TRIAL NO. A-8504201

EVELYN PENCE, Individually and as Personal Representative and Administratrix of the Estate of Phillip J. Pence, deceased,
Plaintiff-Appellant,

vs.

BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY, OHIO,

HAMILTON COUNTY, OHIO,

LINCOLN J. STOKES, SHERIFF OF HAMILTON COUNTY, OHIO,

VICTOR CARRELLI, CHIEF DEPUTY,

MICHAEL MONTGOMERY, DIRECTOR OF CORRECTIONS,

WILLIAM A. WITHWORTH, SUPERINTENDENT,

STANLEY GROTHAUS, DEPARTMENT SUPERINTENDENT,

ROBERT BROCKMEYER, CHIEF OF SECURITY,

JAMES YORK, SUPERVISOR,

and

THE CINCINNATI INSURANCE COMPANY,
Defendants-Appellees,

and

WILLIAM ZUERN, et al.,
Defendants.

DECISION
(Filed February 15, 1989)

Civil Appeal From: Court of Common Pleas

Judgment Appealed From is: Affirmed

Date of Judgment Entry on Appeal: February 15, 1989

Condit & Dressing Co., L.P.A., and John W. Dressing, Esq., 305 Dixie Terminal Building, Cincinnati, Ohio 45202, for Plaintiff-Appellant,

Arthur M. Ney, Jr., Prosecuting Attorney, and Robert E. Taylor, Esq., 420 Hamilton County Courthouse, Court and Main Streets, Cincinnati, Ohio 45202, for Defendants-Appellees.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, stipulations as to a contract and several depositions, journal entries and original papers from the Hamilton County Common Pleas Court, the briefs and argument of counsel.

Evelyn Pence, individually and as executrix of the estate of her deceased son, (appellant) filed a complaint against the Board of County Commissioners of Hamilton County and Hamilton County, the Sheriff of Hamilton County, the Chief Deputy Sheriff of Hamilton County, the Director of Corrections, the Superintendent of the Community Correctional Institution, the Deputy Superintendent of the Community Correctional Institution, the Chief of Security of that institution, and the Supervisor of the Community Correctional Institution. Appellant also named as defendants William Zuern, John Does, and The Cincinnati Insurance Company. The demand was for compensatory and punitive damages for the wrongful death of Phillip J. Pence (Pence), at the time of his death a corrections officer employed at the Community Correctional Institution (CCI). Pence died as a result of being stabbed by Zuern with an instrument fashioned from a piece of wire.

A default judgment was granted against Zuern, the John Does were dismissed, summary judgment was granted in favor of the other defendants, and this appeal followed.

Appellant assigns four errors, each of which protests, on separate grounds, the granting of the summary judgment. We will treat each assignment as an issue to one assignment of error protesting the granting of summary judgment in favor of appellees (all named defendants except Zuern).

First, appellant challenges the retrospective application of R.C. 4121.80(G), effective August 22, 1986. Pence was mortally wounded on June 9, 1984; the complaint was filed on May 30, 1985. The summary judgment was entered on January 29, 1988, and specifically found that "Amended Substitute Senate Bill No. 307 of the 116th General Assembly is constitutional as applied to the facts of this case." But, on April 13, 1988, the Supreme Court of Ohio held that R.C. 4121.80(G) could not be applied retrospectively because to do so would be in violation of Section 28, Article II of the Ohio Constitution. *Van Fossen* v. *Babcock & Wilcox Co.* (1988), 36 Ohio St. 3d 100, 522 N.E.2d 489, paragraph four of the syllabus. Although the decision in *Van Fossen* was handed down after the judgment of the trial court in the case on review, it compels this court to recognize as error the action of the trial court holding the retrospective application of R.C. 4121.80(G) to be constitutionally permissible.

The second basis for the appellant's assignment of error to the granting of summary judgment is an assertion that there are genuine issues of material fact raised by the application of the definition of an intentional tort as contained in *Jones* v. *V.I.P. Development Co.* (1984), 15 Ohio St. 3d 90, 472 N.E.2d 1046. Appellant states this is the applicable law as set forth prior to *Van Fossen, supra.*

We agree that the definition of an intentional tort is contained in *Jones, supra,* as follows:

> An intentional tort is an act committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur.

Jones, supra, paragraph one of the syllabus. The added element in R.C. 4121.80(G) that makes its retrospective application constitutionally infirm is a "deliberate intent" to cause an injury. The law prior to the enactment of R.C. 4121.80(G) was stated in *Jones* as follows:

> Thus, a specific intent to injure is not an essential element of an intentional tort where the actor proceeds despite a perceived threat of harm to others which is substantially certain * * * to occur.

Jones, supra at 95, 472 N.E.2d at 1051.

The Supreme Court in *Van Fossen* wrote that they "*now interpret Jones* to require knowledge on the part of the employer as a vital element of the requisite intent." *Van Fossen, supra* at 116, 522 N.E.2d at 504 (emphasis added). The court held further that in order for intent to be found in a claim of an intentional tort committed by an employer against an employee three conditions must be demonstrated: (1) the employer's knowledge of the existence of the danger; (2) the employer's knowledge that if the employee, by virtue of the employment, is subjected to that dangerous condition, then harm to the employee is a substantial certainty, and not just a high risk; and (3) the employer with such knowledge and under such circumstance required the employee to continue the employment tasks.

Although the law as contained in R.C. 4121.80(G) may not, constitutionally, be applied to the case on review, the law announced in *Jones, supra* and interpreted in *Van Fossen, supra*, does not have that constitutional impediment. Thus, we review the evidentiary material submitted for consideration on the motion for summary judgment to determine if there is a genuine issue as to the existence of any of the three conditions, set forth in the *Van Fossen* interpretation of *Jones*, that are required to find the intent necessary to support a claim of intentional tort.

The conditions at CCI as they existed prior to the construction of the Hamilton County Justice Center are documented

in the legal records, both state and federal, in this county. It would serve no purpose to list, once again, all those conditions. It is sufficient to state that the county was under orders to make numerous changes in physical conditions and operations pending the closing of the institution. A jail or penal institution is a place of danger by its very nature and purpose. The following statements from *Van Fossen* may be analogized to the case that we review:

> There are many acts within the business or manufacturing process which involve the existence of dangers, where management fails to take corrective action, institute safety measures, or properly warn the employees of the risks involved. Such conduct may be characterized as gross negligence or wantonness on the part of the employer. However, in view of the overall purposes of our Workers' Compensation Act, such conduct should not be classified as an "intentional tort" and therefore an exception, under *Blankenship* or *Jones*, to the exclusivity of the Act.

Van Fossen, *supra* at 117, 522 N.E.2d at 504 and 506.

Applying the appropriate law to the permissible evidentiary material submitted by the parties, in accordance with Civ. R. 56, we find there is no genuine issue of material fact concerning the knowledge required in order to have a justiciable claim of intentional tort and the trial court did not err in so ruling. See *Mitchell* v. *Lawson Milk Co.* (1988), 40 Ohio St. 3d 190, ____ N.E.2d ____.

The third basis of complaint of the summary judgment in favor of the county commissioners asserts that the duty is on the commissioners to provide a jail meeting the minimum standards for jails in Ohio and that the commissioners assumed responsibility for providing such facility under a contract with the City of Cincinnati. Neither contention in this attack on the summary judgment has merit.

R.C. 307.01(A) requires a board of county commissioners to provide a jail when in the judgment of the board a jail is needed. In such event, it shall be of such style, size, and ex-

pense as the board determines. Any new jails or renovations to existing jails shall be designed and all jails shall be operated in such manner as to comply substantially with the minimum standards promulgated by the department of rehabilitation and correction.

The appellant asserts that the board of commissioners violated these minimum standards in four ways: (1) the jail and the immediate grounds were not kept free of potential health and safety hazards; (2) the grounds, walkways, driveways, and parking areas were not kept in good repair and well lighted to insure safety and adequate perimeter security; (3) all building elements were not structurally sound, clean and in good repair; and (4) sufficient lighting was not provided to insure effective security in all areas. See Appellant's Brief at 20. Of the four specified violations, the first three are without merit; they have no causal relationship to the death of Pence. The fourth has an apparent relevancy until the facts of the case on review are analyzed. Upon analysis, the facts are that Zuern was visible in his cell even in the dim light that was provided. Further, the brightest light possible would not have prevented Zuern from lunging at Pence and stabbing him through the crack in the cell door the second it was opened.

Further, any responsibility for operating CCI "assumed" by the county officials as a result of the contract with the City of Cincinnati could rise no higher than their responsibility independently of the contract. We have previously noted the absence of any causal connection between the asserted violations of the minimum jail standards. There is therefore, as a matter of law, no legal liability on the county commissioners for the tragic death of Pence. On the undisputed material facts, the commissioners were entitled to summary judgment in their favor.

Finally, appellant asserts that her claim for relief pursuant to Section 1983, Title 42, U.S. Code was erroneously terminated by summary judgment in favor of the appellees. We disagree.

A review of the evidentiary material in support of and op-

posed to the summary judgment discloses no genuine issue of material fact relevant to the claim that the appellees, under color of law, deprived the appellant's decedent of federal constitutional or statutory rights.

The conduct of appellees of which appellant complains amounts at most to an allegation of a lack of due care that does not state a claim under Section 1983. See *Davidson* v. *Cannon* (1986), 474 U.S. 344, ____, 106 S. Ct. 668, 671.

The judgment appealed from is affirmed.

HILDEBRANDT, P.J., DOAN and KLUSMEIER, JJ

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

NO. C-880080

EVELYN PENCE, Individually and as Personal Representative and Administratrix of the Estate of Phillip J. Pence, deceased,
Plaintiff-Appellant,

vs.

BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY, OHIO,

HAMILTON COUNTY, OHIO,

LINCOLN J. STOKES, SHERIFF OF HAMILTON COUNTY, OHIO

VICTOR CARRELLI, CHIEF DEPUTY,

MICHAEL MONTGOMERY, DIRECTOR OF CORRECTIONS,

WILLIAM A. WITHWORTH, SUPERINTENDENT,

STANLEY GROTHAUS, DEPARTMENT SUPERINTENDENT,

ROBERT BROCKMEYER, CHIEF OF SECURITY,

JAMES YORK, SUPERVISOR,

and

THE CINCINNATI INSURANCE COMPANY,
Defendants-Appellees,

and

WILLIAM ZUERN, Et Al.,
Defendants.

JUDGMENT ENTRY
(Filed February 15, 1989)

This cause came on to be heard upon the appeal on questions of law, assignments of error, the record from the Court of Common Pleas of Hamilton County, Ohio, the briefs and the arguments of counsel.

Upon consideration thereof, the Court finds that the assignments of error are not well taken for the reasons set forth in the Decision filed herein and made a part hereof.

It is, therefore, Ordered by the Court that the judgment of the Court of Common Pleas of Hamilton Coiunty, Ohio, be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Judgment, with a copy of the Decision attached, shall constitute the mandate pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To all of which the appellant, by her counsel, excepts.

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A-8504201

EVELYN PENCE, Individually and as Personal Representative and Administratrix of the Estate of Phillip J. Pence, Deceased

Plaintiff

vs.

BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY, OHIO

HAMILTON COUNTY, OHIO
c/o Board of County Commissioners of Hamilton County, Ohio

and

LINCOLN J. STOKES, SHERIFF

and

VICTOR CARRELLI, CHIEF DEPUTY

and

MICHAEL MONTGOMERY, DIRECTOR OF CORRECTIONS

and

WILLIAM A. WITHWORTH, SUPERINTENDENT

and

STANLEY GROTHAUS, DEPARTMENT SUPERINTENDENT

and

ROBERT BROCKMEYER, CHIEF OF SECURITY

and

JAMES YORK, SUPERVISOR
and
WILLIAM ZUERN
and
JOHN DOES
(Real names and addresses unknown)
and
THE CINCINNATI INSURANCE COMPANY
Defendants

JUDGMENT ENTRY GRANTING MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT
(Nurre, J.)

This cause came on to be heard on the Motion of Defendants Board of County Commissioners of Hamilton County, Ohio; Hamilton County, Ohio; Lincoln J. Stokes; Victor Carrelli, Chief Deputy; Michael Montgomery, Director of Corrections; William A. Withworth, Superintendent; Stanley Grothaus, Department Superintendent, Robert Brockmeyer, Chief of Security; and James York, Supervisor; for Summary Judgment pursuant to Rule 56, Ohio Rules of Civil Procedure, and the Court having considered the pleadings in the action, the Memorandum filed by counsel and the Affidavits, Depositions and Interrogatories relied upon therein and filed with the Court, the Court makes the specific finding that the Amended Substitute Senate Bill No. 307 of the 116th General Assembly is constitutional as applied to the facts of this case, and, further having found that there is no genuine issue of fact to be submitted to the Court, and concluded that the above-named Defendants and, therefore, Defendant The Cincinnati Insurance Company are entitled to Judgment as a matter of law, it is hereby

Ordered, that Defendants' Motion for Summary Judgment is in all respects granted, and it is further

Ordered and Adjudged, that Judgment shall be, and is

hereby entered, in Defendants Board of County Commissioners of Hamilton County, Ohio; Hamilton County, Ohio; Lincoln J. Stokes; Victor Carrelli, Chief Deputy; Michael Montgomery, Director of Corrections; William A. Withworth, Superintendent; Stanley Grothaus, Department Superintendent; Robert Brockmeyer, Chief of Security; James York, Supervisor; and The Cincinnati Insurance Company's favor, dismissing this action with costs for Defendants and against Plaintiff.

The Court further certifies and expressly determines herein, that there is no just reason or cause for delay and therefore, hereby enters final Judgment for the above named Defendants only.

_____

Honorable Thomas C. Nurre

Have Seen:
/s/ Robert E. Taylor T-106
Ass't Prosecuting Attorney
Hamilton County, Ohio

/s/ John W. Dressing D-086
Trial Attorney for Plaintiff
CONDIT & DRESSING CO., L.P.A.
305 Dixie Terminal Building
Cincinnati, Ohio 45202
(513) 579-1100

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A-8504201

(Judge Thomas C. Nurre)

EVELYN PENCE, Individually and as Personal Representative and Administratrix of the Estate of Phillip J. Pence, Deceased

Plaintiff

vs.

BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY, et al.

Defendants

EXHIBIT "C" TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT — AFFIDAVIT OF KEN KATSARIS

AFFIDAVIT OF KEN KATSARIS

STATE OF FLORIDA)
) SS:
COUNTY OF LEON)

Comes now the Affiant herein, Ken Katsaris, and having been first duly cautioned and sworn, deposes and states, based upon his own personal knowledge, the following:

Affiant is the President of Katsaris and Associates, Criminal Justice Consultants, and has had 20 years of professional experience in the criminal justice field. Affiant's educational

background includes a Bachelors and Masters Degree with a Major in Corrections, is a Doctoral Candidate, has served as a police officer, instructor in police and correction academies, and a professor of Criminal Justice teaching a variety of courses in corrections and law enforcement.

In addition, Affiant was a consultant to the Federal Bureau of Prisons teaching corrections management to staff, served as Sheriff of the Capital of Florida, and administered a jail facility in Florida, served as Assistant to the Director of Corrections for the State of Florida where Affiant assisted in promulgating model rules for the operation of county detention facilities.

Further Affiant states that the Governor of Florida appointed him to the position of Commissioner of the Florida Corrections Standards and Training Council where Affiant participated in setting policy and standards for all correctional offices in Florida. Affiant has been certified as a jail manager by the State Department of Corrections and served as a consultant to the Florida Criminal Justice Standards and Training Commission in the development of a model 320 hour basic training program for all correctional officers. Affiant has testified in every level of court as an expert witness in corrections and published a legal text book entitled EVIDENCE AND PROCEDURE IN THE ADMINISTRATION OF JUSTICE which is used by many colleges. As a result of Affiant's experience and education, Affiant has knowledge of Federal, State and Local standards in the operation of jails and correctional facilities and is competent to testify to the matters stated in this affidavit.

Affiant states that he has been requested by John W. Dressing, Attorney at Law, to review certain materials and evidence developed in the case of *Evelyn Pence, Administratrix* v. *The Board of County Commissioners, et al.*, Case No. A8504201 pending in the Court of Common Pleas, Hamilton County, Ohio, to render opinions with regard to the case.

For purposes of rendering his opinions herein, Affiant has reviewed the following materials provided to him by John W. Dressing:

1. Copies of all pleadings in the case including the Defendants' responses to Plaintiff's interrogatories and requests for production of documents.

2. A copy of the MINIMUM STANDARDS FOR JAILS IN OHIO, FULL SERVICE FACILITY, in effect for the time period of June 1984.

3. Photographs of cell No. 10 and A-Block of the Cincinnati Correctional Institution.

4. The depositions of Schweinfus, Menkhaus, Gibson, York, McCall, Jones, Brockmeyer, Douglas, Cisias, Doughman, Doyle, Fowler, Lambers, Fehr, Prior, Haynes, Burton, and Chief Carrelli.

5. Portions of the file of Phillip Pence, investigation reports by Detective Bennett, correspondence between Sheriff Stokes and Mr. Lehman, and other documents provided to John W. Dressing pursuant to his request for production of documents directed to the Defendants in this case, including an analysis of law enforcement officers feloniously killed, CCI training curriculum and training received by Phillip J. Pence, official crime laboratory report from the Hamilton County Coroner's Office listing the weapon as being a metal rod approximately seven and three-quarters (7¾) inches long, looped on one end and pointed on the other end and dimensions of cell No. 10 in A-Block.

6. Copies of Defendants' Motion for Summary Judgment with its affidavits.

Further Affiant states that established national and state corrections standards, including those promolgated by the American Corrections Standards Association, set forth minimum requirements for the operation of corrections facilities, among which are as follows:

A) Metal detectors at all critical checkpoints in the institution for purposes of security against weapons being

brought into the facility and into critical areas inside. Such detectors are not affected by metal bars within the jail.

B) Material and tools which can be fashioned into weapons or used as weapons must be absolutely controlled to prevent such material from being so used. This would include metal buckets with metal handles and metal fence material.

C) Jail facilities must be equipped with latrines for inmate toilet purposes to be consider adequate.

D) Cells and cell areas must be equipped with lights that produce a clear, well lighted view of the interior of each jail cell for security purposes.

E) Procedures for the operation of a jail facility, including shake down procedures, must be in writing and available to all correction officers.

In addition, other acceptable and routine minimal practices in the operation of jail facilities include:

A) Chain link fencing material, if used at all, should be of a gauge thick enough that it cannot be bent or removed by hand but only by the use of wire cutters.

B) Training in jail procedures should exceed two weeks for each correctional officer.

C) Close circuit T.V. cameras can be used as a security method.

D) Extreme caution should be taken when there is a report of a weapon. All efforts should be concentrated immediately upon locating and removal of the weapon.

Further Affiant states that the facts upon which he bases his opinion herein have been obtained by a review of the materials set forth in this affidavit and materials provided to Affiant by John W. Dressing, and include the following:

That on June 9, 1984, Phillip Pence was assigned to the second shift as a correction officer in the Cincinnati Correctional Institute. His duties included supervision of inmates in the institution in specified areas as assigned and other miscellaneous correction officer's duties including shake down of inmate cells and of the inmates themselves, searching for contraband or weapons.

A first shift correction officer received information that a William Zuern, an "A-Block" maximum security inmate, had a self made knife in his possession. Although this information was received by the correction officer at approximately 2:00 p.m. on June 9, 1984 and the supervisor told of the information at approximately 2:30 p.m. on June 9, 1984, supervision decided to wait until later in the second shift to conduct a search for the weapon. Procedures to be followed at CCI upon report of a weapon and shakedown of cells were not in writing or available to the correction officers in writing at the time.

The lighting available in the CCI generally and in "A-Block" consisted of some flood lights which would light up the common area of "A-Block" but not inside of the cells, and a row of lights outside of and over the top of the cells, including cell no. ten (10), which was William Zuern's cell. These lights were also not adequate to flood the inside of the cells, including cell ten (10), and the natural daylight lighting available during the first shift was lacking on the second shift when supervision of CCI initiated the shake down of Zuern and his cell.

Because of the age and state of repair and renovation of CCI at the time, latrines or toilets were not available for inmates, including the maximum security area of "A-Block" where Zuern was in prison. To provide relief to inmates over night, metal buckets with metal handles were supplied to inmates for toilet purposes. In addition, chain link fence material was used in various inmate access areas throughout the institution at the time. It was common knowledge to correction officers and supervision that the metal bucket handles and metal fence material were removed by inmates and

fashioned into weapons which could be lethal. In spite of this knowledge, the metal buckets with metal handles continued to be issued to prisoners including maximum security prisoners in "A-Block". Nothing was done to remove the fence or to replace it with fence material which could not be removed for such purposes.

Protective defensive materials such as bullet proof vests were not issued to the correction officers at the time and the institution did not have close circuit television system for security monitoring purposes.

Shortly after 10:00 p.m. on June 9, 1984, supervision told correction officer Pence and three other officers to go to cell Block A for purposes of doing a shake down of the cells of two inmates. The supervisors themselves did not go to "A-Block" until Phillip Pence had already been stabbed by inmate Zuern. The correction officers only had flashlights for illumination into the cell area and Zuern was told to come out of the cell. When he moved out of the cell, he immediately lunged at correction officer Pence, stabbed him in the chest with a weapon fashioned either out of the fence material or metal bucket handle, most probably the metal bucket handle.

My opinion, based upon reasonable certainty in the field of corrections and jail facility management, is that the Sheriff's department and the Board of County Commissioners, in their use and operation of the Cincinnati Correctional Institute as a jail facility, fell below acceptable corrections practices in the following respects:

First, the Cincinnati Correctional Institute was grossly inadequate as a jail facility due to its inadequate lighting and plumbing for inmate use. The lack of lighting contributed to an exceedingly dangerous security problem including shakedown of cells. The lack of toilet facilities was aggravated by the actual issuance of metal buckets with metal handles and access to fence material which could be removed from the fence without a wire cutter. National standards for jail facilities call for strict control of tools, which would in my opinion include bucket handles and fence materials, which could be fashioned and used as weapons by inmates.

Further, supplying metal buckets with metal handles which were routinely removed by inmates who were again reissued another metal bucket with metal handle, in view of the complaints and concerns of the correction officers to supervision over a long period of time prior to the date on which Phillip Pence was killed, was totally an unacceptable practice in the management of a jail facility.

Lights are available for jail facilities inside the cells and should have been so installed to provide a better view of a prisoner during a shake down or for other purposes.

There was a failure of supervision to follow acceptable prison standards and practices in the actual search and shake down of the inmate William Zuern. The information concerning the weapon in Zuern's possession, should have been acted upon immediately and with extreme caution and during the daylight hours. It does not appear that there was even more manpower to supervision on the second shift when they actually conducted the shakedown.

Chain link fence material, if accessible to inmates at all, should have been of a gauge which would require a wire cutter to remove. Such material was available at the time of this incident.

Metal detectors were also available at the time of this incident which could be used at check points in the institution for screening against contraband and weapons in the possession of inmates. Such equipment is available which would not be affected by the metal cell doors but would be located at critical points in the cell areas.

Shake down procedures were not in writing and available in writing to the correction officers at the time of this incident. The officers were further given no information by supervision, and also were not even supervised, in the search of Zuern's cell. They were told that generally Zuern and another inmate had a weapon but were not given any supervisory instructions or attention in the shake down of the cell itself.

By permitting Zuern to have a weapon in his possession for approximately eight hours after it was known, fell below ac-

ceptable jail management standards. The weapon could have been used to kill other guards and inmates who may have been unaware of Zuern's possession of the weapon in that eight hour time period. The supervision's failure to immediately respond to this report of a weapon was reckless and below minimum acceptable corrections standards. Protective vests and other defensive materials which were available at the time of this incident, would have provided a measure of safety to Phillip Pence and the other guards in their search and shakedown of Zuern's cell. The training of Phillip Pence for two weeks in-house by the Sheriff's department was inadequate to fully prepare a correction officer for knowledge of jail procedures.

It is Affiant's opinion, that based upon reasonable certainty in the field of corrections and jail management, supervision, including the Sheriff himself and also the Board of County Commissioners, fell below acceptable standards as indicated above and that such failure was substantially certain to cause injury or death to an inmate or correction officer such as that which did occur to correction officer Phillip Pence on June 9, 1984. The deliberate acceptance by Defendants of the conditions outlined herein, directly caused the death of Phillip Pence, in my opinion. The deliberate providing of the material with which to make lethal weapons to inmates further directly caused the death of Phillip Pence.

Further Affiant saith naught.

/s/ KEN KATSARIS

Sworn to before me and subscribed in my presence, this 22nd day of December, 1986.

/s/ NANCY C. BARBER
Notary Public — State of Florida

EXCERPTS FROM DEPOSITION TESTIMONY

A. Respondent Robert J. Brockmeyer

[4] Q. Would you state your name for the record, please.
A. Robert Joseph Brockmeyer.
Q. And what is your occupation?
A. I am a Correction Supervisor III.

* * *

[18] Q. Now, you have had occasion to see weapons that were made by the inmates out at CCI prior to Phil being killed, did you not?
A. I have seen them for thirty-some years.
Q. The questions that I will ask, I will limit myself to — or try to — will be those that were in existence prior to when Phil was killed and up to the date he was killed. I won't ask you questions about the year after he was killed.
What type of weapons did you see out there prior to the time Phil was killed?
A. I have seen shanks.
Q. What were the shanks made of?
A. They were made of various things. They were made of pieces of wire off the fencing, they were made out of a toothbrush, plastic toothbrushes made with razor blades which the officers failed to retrieve. They were made out of glass from the windows.

* * *

B. Witness Jerry Doughman

[3] Q. Would you state your name and your occupation, please?
A. Yes. Jerry Doughman, D-o-u-g-h-m-a-n, deputy sheriff.

* * *

Q. You're a deputy corrections officer?
A. Yes.

* * *

[9] Q. Now, before Philip's death in June of 1984, did you ever have the occasion to see inmate-made weapons at CCI?

A. I saw them have weapons, what we call shanks.

Q. How frequently did you see that?

MR. HURLEY: Objection. What time period are we talking about?

MR. DRESSING: Before Philip was killed.

MR. HURLEY: Narrow it down.

[10] Q. A year before Philip was killed.

A. It depends. You know, some days — at that time, before Phil was killed, I worked in bond and hold, so I never shook anybody down. It wasn't my job, but I saw other officers bring shanks to me or sergeants.

Q. Sergeants?

A. It could be one a day, one a week. It depends on the — what was going on.

Q. And when you said they would bring them to you, is there any reason why they would bring them to you?

A. The deputies?

Q. Yes.

A. The deputies would bring them to me just to give them to the sergeants.

Q. And then would you be the one that would give them to the sergeants?

A. Right.

* * *

Q. Now, what types of weapons were these?

A. Some of them was metal, round metal with a [11] sharp point on the end. The other ones were like a toothbrush with a razor blade melted inside and that was about the only two I ever saw.

* * *

Q. You had occasion to see metal buckets with metal bucket handles out there, did you not?

A. Right.

Q. And did you notice that those bucket handles would disappear from buckets after they were issued to inmates?

[12] A. Yes.

Q. Was there any concern on your part that they were being used to be made into weapons?

A. Yes.

Q. Did you express that concern to anyone in supervision?

A. Yes, I did.

Q. Who did you express that concern to?

A. That was back when I first came there in '79. I worked in maximum security and I just — I don't remember who I talked to. There's only a couple sergeants who worked day shift back then, and I was scared. That was a new job to me and I'm there working with criminals. I never worked with criminals before.

* * *

C. Witness Ronald Doyle

[3] Q. Ron, would you state your name and occupation for the record, please?

A. Ronald R. Doyle, deputy sheriff of Hamilton County.

* * *

[18] Q. Now, how long at the time this happened had you been working in maximum security in A Block there where Zuern was?

A. I can't really say.

Q. Do you know about how long? Was it months?

A. Four months.

[19] Q. Okay. And in that time period were the, what I refer to as night buckets, were they in use in A Block?

A. Yes, sir.

* * *

Q. Are these the metal buckets with the metal handles?

A. Yes, sir.

* * *

Q. Okay. And did you ever see — ever have occasion to

see the handles off, when the buckets just appeared without the handles on them?

[20] A. Constantly.

Q. This is after — this is between the time that you started there in '83 and when Phil was killed?

A. Um-hum.

Q. When you say constantly, can you explain what you meant by constantly?

A. Yes. Second shift — I did over a year in the Main Cell Block before I want to A Block and we had to walk every range every night to confiscate buckets from people who would use one for the bathroom and one for laundry facilities. So we had to check so they only had one and we were always gathering buckets that had no handles.

* * *

[21] Q. And do you know what materials they were made from?

A. I would say some were out of bucket handles, some were out of fences, some were razor blades heated into the end of toothbrushes.

Q. How often would you find the ones made out of bucket handles and metal fences in that time period before Phil was killed?

A. Before Phil was killed? In the two years I was there, I probably found 20 maybe.

Q. Okay.

A. In two years.

Q. You, yourself?

* * *

[22] A. Yes.

Q. What would you do when you would find these shanks?

A. Turn them into the supervisor's office.

Q. And did you ever express any concerns to supervision about these shanks?

A. No. I think they all knew and we all were concerned about them.

Q. And were the buckets continued to be used with metal handles after the shanks were turned in?

A. Yes, sir.

* * *

D. Charles H. Gibson

[4] Q. Supervisor Gibson, would you state your full name and occupation, please.

A. Charles Hugh Gibson, Supervisor I, Hamilton County Sheriff's Department.

* * *

[27] Q. You have seen weapons made down at CCI before [28] Phil was killed; haven't you?

A. Yes, sir.

Q. What kind of weapons would you see made down there?

A. I would say shanks made out of fence or whatever piece of wire they could make a shank out of.

Q. What about bucket handles?

A. They were either parts of the fence or bucket handles. It's hard to tell which is which until you really get into it. They would take razors and melt them into toothbrushes, things of that nature.

Q. But the shank would be made from a bucket handle or a part of a fence?

A. Right.

Q. What part of the fence?

A. Well, the fence is a wire fence, and they could break it off and make a shank out of it the same way.

Q. A chain link fence?

A. Right.

Q. Do they make it out of the actual chain link or do they make it out of the material that secured the chain link to the post?

A. I have seen the whole chain link cut in half. I don't

know where the posts go. I have seen the ties missing. [29] They both, to me, resemble a bucket handle.

Q. Which was used more frequently, the fence material or the bucket handles; if you know?

A. I really can't tell you.

Q. They were both used with some frequency?

A. Oh, yes.

Q. Where did the buckets come from from which they got the bucket handles?

A. That's their night bucket that they use for their bathrooms at night in their cells.

Q. Would these be issued to everyone at CCI or to just certain areas?

A. No, each inmate was issued one.

Q. A-Block where Zuern was?

A. Yes, sir.

Q. Can you describe what these buckets looked like, Officer Gibson?

A. They were like a galvanized bucket, with a metal handle going around the top.

Q. How could the handles be taken off of them?

A. There's just a little tab and you can just bend that or break it off.

Q. It's pretty easy to do that?

A. Not much of a problem.

[30] Q. How did they make weapons out of it?

A. They straightened them and bent them around to fit their hand and then they would sharpen the edge, you know.

Q. How did they sharpen the edge?

A. With a piece of concrete or a piece of metal fence.

Q. How often, back prior to when Phil was killed by Zuern, would weapons be found out there — the shanks I'm referring to now — made from the buckets or the fence material?

A. I can't really tell you. I only worked one shift at that time, and on my shift, maybe four or five a day was turned in.

Q. Four of five shanks per day were turned in?

A. Yeah. You would have inmates making them to turn them in to get a phone call. They'd say, "Hey, I will tell you where a shank is if you will give me a phone call." I would give them a phone call, because they knew I wanted the shank.

Q. At any rate, they would have the actual shanks made, right?

A. Yes.

* * *

E. Witness Robert Haynes

[3] For the record, would you state your full name and also your occupation?

A. Robert Mark Haynes, deputy sheriff.

* * *

[10] Q. Now, how often would you find these weapons made out of these materials that you described?

A. Two, three times a week.

Q. And how many would you find when you would find them?

A. About one each time.

Q. Okay. Would you say anything to anybody when you found these?

A. Just show it to the supervisor and put it on his desk in the office.

Q. Would you have any discussion with him about it?

A. No. Just told him we found one. He'd say, put it on the desk.

Q. Did they ever give you any instructions about what to do with these shanks when you found them?

A. Just — they usually stick them on the desk, in a drawer.

* * *

[11] Q. What about the bucket with a metal handle, what [12] would —

A. A lot of them usually sit on them and crack them or

somebody might take two, use one for a rest room, one to sit on.

Q. Okay. And the — did you ever have the occasion to remove any of the bucket handles yourself?

A. Yes, sir.

Q. And when did you do that?

A. When I was working second shift cell block, we got a shipment in and we took them off once because we had a lot of shanks in the block and we took them off.

Q. How many — were these metal buckets?

A. Yes, sir.

Q. How many handles did you take of? How many buckets, if you know.

A. We had about 25 buckets we took off.

Q. Took the handles off 25 of them?

A. Yes, sir.

Q. Did anybody instruct you to do that?

A. No, sir. We done it on our own.

Q. Did you leave the handles off?

A. No, sir. We was told to put them back on.

Q. Who told you to?

A. S-1 Gibson.

[13] Q. When you say S-1 Gibson, is that Supervisor Gibson?

A. Yes, sir.

Q. And did you — why did you want — why did — first of all, who was with you, if you recall?

A. Deputy Lambers.

Q. Why did you remove the bucket handles?

A. So they wouldn't make shanks out of them.

Q. Did you talk to the supervision about removing them?

A. No, sir.

Q. Did you ever express any concern to supervision about the shanks?

A. Yes, sir.

Q. Could you explain who you did that to?

A. S-1 Gibson, we told him there were a lot of shanks, and he told us to put them back on.

Q. Did he say anything?

A. He said put them back on because of a health hazard.

Q. Health hazard?

A. Yeah. I guess they didn't want to touch the rim of the bucket.

Q. Of a bucket without handles?

[14] A. Right.

Q. And did you ever have any discussions with supervision about using some type of a substitute for metal buckets with handles?

A. No, sir.

* * *

F. Witness David Lambers

[3] Q. State your name and address for the record?

A. David Lambers, 7919 State Road.

Q. And what is your occupation?

A. Corrections officer.

* * *

[6] Q. Now, are you familiar with — were you familiar at the time of the use of metal buckets with metal handles issued to inmates at CCI?

A. Yes.

Q. These were given to them for bathroom purposes, right?

A. Right.

Q. Because they didn't have bathroom facilities in the cell?

A. Right.

Q. And did you ever have the occasion to see weapons made with bucket handle material?

A. I have never seen them make them, but I have seen many of them that have been made.

Q. And how often would you see such weapons?

A. Well, when I worked in the cell block, I would [7] take out about five to ten a night.

* * *

Q. And with regard to the date on which Philip was killed, how many would you say within the six-month time period before Philip was killed?

A. That's really hard to give an exact number, but I would say probably around 30.

* * *

Q. * * * Do you, of your own personal knowledge, know whether they were made of any other material?

A. I know they were made of fence, fencing material, but I have never seen one.

Q. Okay. And what would you do when — you say that you would find these shanks made from bucket handles. What would you do when you would find them?

[8] A. I would collect them and put them on the supervisor's desk.

Q. And was there any policy, written policy, as to what you were — was there any written policy that you were aware of as to what to do with them when you found them?

A. Not that I know of.

Q. And would you have any conversation with your supervisors about it at any time when you found those?

A. I just told him what I got out of the block that night. Nothing really formal.

Q. And what would they tell you, if anything, about it?

A. They would just say, good job. That's basically it.

* * *

[9] Q. Did you ever have the occasion yourself to do anything with the metal buckets and the handles?

A. Well, one time myself and Deputy Haynes were taking the handles off and Supervisor Gibson came back into the block and he told us not to take them off.

Q. How many bucket handles did you take off?

A. We had taken about 20 off.

Q. And why were you taking bucket handles off?

A. Because they were a known weapon.

Q. How long had that occurred before Philip was killed?

A. Approximately a year, year-and-a-half.

* * *

G. Witness Rufus McCall

[4] Q. Would you state your name and occupation, please.

A. Rufus McCall. My occupation is Corrections Officer, Hamilton County Sheriff's Department.

* * *

[14] Q. Were there ever any discussions among the supervisors or among the guards about putting some other material in the chain link fence there?

A. There was always a discussion. Everybody was concerned. Usually, the concern would come from the newer guys that would come in, and as you were there longer, guys sort of got relaxed and they didn't worry about it or think about it as much. But a new guy would come in and he'd be a little concerned. He'd think this might be dangerous, especially after they had been on a shakedown and had found weapons. But then after you were there awhile you just kind of didn't think about it very much.

Q. What would the new people be concerned about? Who would they express their concern to?

A. Each other, the supervisors; just anybody that would listen.

Q. What would the supervisors tell the individuals?

MR. HURLEY: Objection. Let's get to a specific conversation —

Q. Do you recall a specific conversation?

A. Not really. I can recall, you know, when I started there and my concerns when I first went there, but as far as, you know, do I remember a conversation that took place on a certain day between two individuals, I don't recall that.

[15] Q. But you do remember that new deputy corrections officers would express concern?

A. Yes. Very often, the new people would be concerned

about safety itself because they would start and they were new and there's a lot of prisoners and they are thinking about their safety and they are being a little bit more cautious. But then after you are there for a year or two, or whatever, you get a little more relaxed.

Q. And you say that when you first started there you were concerned about the fence materials?

A. Yes, I was concerned when I first started. I didn't start there. I started downtown, but when I became a supervisor and transferred to CCI, I had more contact with it. I was more concerned about the — one of my concerns was: Was this fence strong enough to keep someone from going over? The other concern was that it was very easy to break stuff off of there and use it as weapons.

* * *

[19] Q. That fence material that we see around that Exhibit No. 8, that's the type of material you're talking about that they make weapons from, right?

A. Yes.

Q. Did they ever replace that fence with new fence?

A. This fence?

Q. Any of the fences in the ranges.

A. No. The only thing I remember them doing, as far as altering the fences on the end of the ranges, at one time there was no fencing there and we had a few inmates diving off the ranges. So they enclosed that also. But as far as replacing the fence, to my recollection they never replaced it.

* * *

[24] Q. Was an inspection made by yourself, as a supervisor, or other individuals there, to look for buckets that didn't have handles on them?

A. Yes. You saw buckets without handles, but usually what would happen if you questioned an inmate about what happened to the handle of the bucket, he'd say it broke or he threw it in the garbage can or, "I need a new bucket." Some

of the buckets were old and the handles would just come off easily so——

Q. Pardon me?

A. I was just saying that some were old and the handles did just come off.

Q. Would there ever be a shakedown when it would be noticed that the handles were missing from buckets, to see if weapons were made from them?

Q. Sure. You'd have a shakedown and maybe find in a guy's cell he wouldn't have a handle on a bucket. But you didn't consider it a big deal if it didn't have. One, a lot of times they break it off. Two, some of the buckets were old and the handles just came off, and three, some guys would tell you that they took it off because they didn't like the handles on the buckets. They would rather carry it without the handles.

[25] Q. When it was noticed that a bucket didn't have a handle, would it be replaced with one with handles?

A. I always instructed my people that worked with me to replace the bucket if it didn't have a handle on it.

Q. Did any of the people that worked for you express concerns about buckets that didn't have handles on them?

A. Yes, guys expressed a concern. But, you know, like I said, one day guys are really concerned about it and another day they're not. If you go and have a shakedown and you find five or six shanks, you know, everybody is concerned. If you go a week without finding anything, people forget about the concern.

* * *

[26] Q. Okay. When shanks would be found, what would be done with the shanks?

A. We would take it, take it to the office, put it in a pile, and we would usually get rid of them, take them out to the dumpster in the back and throw them in there. And, you know, maybe at the end of the week, or whenever they collected the garbage, they would take the dumpsters out and get rid of them.

Q. In the course of a week, before Phil was killed, how many shanks would be found?

MR. HURLEY: Objection. You can answer.

A. I really couldn't say how many exactly. It varied. [27] One week you may find one and one week you may find none. And some weeks you may find a bunch of them.

Q. What do you mean by a bunch of them?

A. Five or six.

Q. In a week?

A. It was possible. It wasn't an everyday thing that you would go in and find five or six. Most of the time they were hidden well or the guys didn't want to keep them on them. They wanted to keep them somewhere where they'd have easy access to them. Because if they got caught with them, we would charge the person.

Q. You say they would accumulate a pile and then toss them out. What do you mean by a pile?

A. You may get two or three or you might get 10 or 12 of them and then you take them out and throw them away, or you might even get — if you have just one, you have somebody take it out to the container in the back and get rid of it.

* * *

H. Witness Kenneth Schweinefus

[4] Q. Officer Schweinefus, would you state your name for the record, please.

A. Kenneth Wayne Schweinefus.

Q. And your occupation.

A. Corrections Officer II.

* * *

[16] Q. What kind of a weapon would that have been?

A. Well, a shank is — in just a few words — is a bucket handle sharpened at the end, sometimes with the end bent.

Q. So that is what you took that to mean?

A. Yes.

Q. Did you see the weapon used on Phil Pence?

A. I didn't see the actual weapon.

Q. Did you have to go to court to testify about that?

A. Yes, I did, sir.

Q. Did you have any conversations with Phil Pence on that day?

A. No, I did not.

Q. Had you ever seen shanks in the institution there before that occasion?

A. Yes, I have.

Q. How frequently would you see them?

A. Very frequently.

Q. Very frequently?

A. Yes.

Q. Could you be more specific?

A. Meaning, that I would say every other day someone would find a shank somewhere in the Main Cell area and also [17] A-Block.

Q. And when you say every other day, would that be one shank or more or what?

A. One or more.

Q. And did you know where these shanks came from?

A. Yes, I did.

Q. Where?

A. They either came from the bucket handles or they came from the fence, torn away from the fence and broken off and sharpened.

Q. You were in A-Block — Were you regularly assigned to A-Block?

A. Yes, I was at that time.

Q. Were you ever instructed by supervision to inspect the fence material or the buckets themselves, to see whether there were missing parts?

A. That was routine every day, more or less.

Q. How did you go about that?

A. You walk the range, check the fence line and you look inside the cell and you glance around for anything out of place or for anything unusual.

Q. If you noticed that a prisoner's bucket didn't have a handle on it, would you do anything specific in response to that?

[18] A. You might take an extra look at that cell to make sure the handle wasn't in there.

Q. Would you quiz the prisoners about it?

A. Sometimes, yes.

Q. When you say you might take an extra look at the cell, would that mean going in and searching underneath the mattress and other hidden parts?

A. Right.

Q. Was that done all the time or just sometimes?

A. It was more or less periodic, I guess you could say. If you knew an inmate was a particular problem, then you might walk in and turn the mattress up or look under a few books or what ever you have in there.

Q. Were there any specific instructions by supervision that when you noticed a bucket missing you should check it out?

A. Not to my knowledge.

Q. How long had the buckets been in use out there when this happened?

A. From the time I started in 1981.

Q. Did you ever complain about the buckets to supervisors?

A. Verbally, yes; never written down.

Q. Who did you complain to about it?

[19] A. I guess I had never complained to a supervisor, just general talk among one another — with the supervisor.

Q. What was your complaint?

A. The fact that they shouldn't have been in there.

Q. Did any of the Corrections Officers make the same complaint?

A. Yes, they did.

* * *

Q. Did supervision do anything in response to that?

A. No, sir, not to my knowledge.

* * *

No. 89-447

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

EVELYN PENCE,

Petitioner,

vs.

BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY, OHIO, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, FIRST APPELLATE DISTRICT OF OHIO

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QUESTIONS PRESENTED FOR REVIEW

May the Due Process claim of a deceased correctional officer, murdered by a jail inmate, brought under 42 U.S.C. Section 1983 against a County government and its officials, be properly decided by summary judgment upon a finding by the state trial court that there was no genuine issue of fact and that Respondents were entitled to judgment as a matter of law; upon a determination by the state court of appeals, upon review, that the conduct of Respondents amounts at most to an allegation of a lack of due care that does not state a claim under Section 1983; and upon a determination by the state supreme court that no substantial constitutional question exists.

PARTIES

PETITIONER (Plaintiff/Appellant in the Court of Appeals, First Appellate District of Ohio)

Evelyn Pence, as Personal Representative and Administratrix of the Estate of Philip J. Pence, Deceased.

RESPONDENTS (Defendants/Appellees in the Court of Appeals, First Appellate District of Ohio)

1. Board of County Commissioners of Hamilton County, Ohio
2. Hamilton County, Ohio
3. Lincoln J. Stokes, Sheriff of Hamilton County, Ohio
4. Victor Carrelli, Chief Deputy Sheriff of Hamilton County, Ohio
5. Michael Montgomery, Director of Corrections, Community Correctional Institute
6. William A. Whitworth, Superintendent, Community Correctional Institute
7. Stanley Grothaus, Department Superintendent, Community Correctional Institute
8. Robert Brockmeyer, Chief of Security, Community Correctional Institute
9. James York, Supervisor, Community Correctional Institute
10. The Cincinnati Insurance Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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JURISDICTION

The decision of the First Appellate District of Ohio was entered on February 15, 1989. The entry of the Supreme Court of Ohio denying review of the decision of the First Appellate District was entered on June 7, 1989 and the petition was filed within ninety (90) days of that date. The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT XIV

Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE. TITLE 42, SECTION 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia, shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

I. The Community Correctional Institute.

The Community Correctional Institute ("C.C.I") was a correctional facility housing criminals in Hamilton County, Ohio. Hamilton County took control of C.C.I. from the City of Cincinnati on August 15, 1981. From at least 1950 through August 15, 1981, there were no stabbings, of inmates or officers, at C.C.I. Between August 15, 1981 and June 9, 1984 (the day Petitioner's decedent, Phillip J. Pence, was killed) 33,244 inmates were housed at C.C.I. During that same period of time 439 inmates who were charged with or convicted of violent crimes were incarcerated in the A-Block Section (where Pence was stabbed) at C.C.I. Yet, during that thirty-four (34) year period only one stabbing occurred, and that was not in A-Block and did not involve a correctional officer.

As stated above, one of the sections at C.C.I. was known as A-Block. The inmates incarcerated in A-Block were:

1. prisoners charged with murder;
2. prisoners with bonds in excess of $35,000.00;
3. prisoners charged with escape;
4. homosexual prisoners; and
5. at times, protective custody prisoners.

Accordingly, A-Block was a smaller area which provided a better view of the inmates for the correctional officers. The fact that an inmate, even one charged with murder, was placed in A-Block did not mean the inmate was believed to be assaultive. In fact, most inmates housed in A-Block were not assaultive or trouble-makers, while incarcerated.

Like any correctional facility in the United States, it was not unusual to find a shank (weapon) at C.C.I. However, it was quite uncommon to find shanks in A-Block. When shanks were found they were almost never located in an inmate's

cell, but rather in one of the common areas. In addition, when an inmate would inform an officer that another inmate had a shank it was usually a tactic to "throw heat on another inmate" or an attempt to gain favors from the officer. Often times the information was inaccurate and, of the times when it was not, it was common that the informant himself had made the shank and tried to blame someone else.

The shakedown of a cell was a routine job. Officers shook down cells continuously for contraband, a couple, three times a day.

II. Respondents' Search Procedure.

The procedure followed at C.C.I. with respect to the search of cells was designed to protect the officers conducting the search. First, the search would not begin until the facility was secure (i.e., inmates locked in their cells) and the most manpower was available. Second, two correctional officers (and sometimes a supervisor) were sent to each cell to conduct the search. And third, the search is not commenced until the inmate has left the cell and one of the officers had the inmate secured.

If a weapon had actually been seen by an officer, not merely an unsubstantiated tip by an inmate, immediate action would have been taken: If an officer knew that an inmate in a cell had a weapon, all available manpower, shields, and nightsticks would be used.

III. Pence's Background, Education and Training.

Pence was hired by and became an employee of the Hamilton County, Ohio Sheriff's Department on August 15, 1981. Pence's position was Correctional Officer II and he was assigned to C.C.I.

Prior to obtaining employment with the Sheriff's Department, Pence attended the Criminal Justice Program at the University of Cincinnati and was graduated from the Univer-

sity on June 12, 1983. Pence's education at the University included the study of corrections.

While employed by the Sheriff, Pence was given in-depth training by the Sheriff's Office. In June of 1983 Pence completed the Hamilton County Police Academy's Corrections Officer Training Program. The topics of shakedowns and all searches were thoroughly discussed and questions on those topics were included in the Final Exam. The thrust of all aspects of that 9-day, 72-hour program was that a correctional officer must do everything possible to maintain the advantage over the inmates. That training included one-half day on general security techniques and another half-day on the when and how of inmate searches and cell searches. More specifically, Pence was taught how to protect himself, shown two videos relating to the shakedown of cells and given "hands-on" training of how to search a cell. Finally, the officers were told throughout the training that the top two priorities were the safety of the officers and the safety of the inmates.

Pence worked for Officer Rufus McCall for almost the entire period of time Pence was employed by the Sheriff's Department. During that time Officer McCall told Pence on numerous occasions that he always had to be careful and that any inmate at C.C.I. could take his life. Furthermore, Pence was involved in many searches at C.C.I. and he knew how to do them correctly and safely.

Pence and officers received both classroom training and on the job training concerning the procedure employed by the Sheriff's office in conducting a shakedown of an inmate's cell.

IV. Events Leading To The Death of Pence.

William Zuern was admitted to C.C.I. for incarceration on May 14, 1984. Because he was charged with murder, Zuern was housed in A-Block. While incarcerated in A-Block Zuern caused no disturbances, was not assaultive and was not a discipline problem.

On June 9, 1984 at approximately 2:00 p.m. an inmate in A-Block, Loyal Hearst, told Officer Schweinfus that Zuern had a shank and that he (Zuern) was going to stab Hearst. Schweinfus had never used Hearst as an informant before that conversation.

Shortly thereafter Officer Schweinfus contacted his partner (Officer Fowler) and explained the situation to him. They decided to pass the information on to their supervisor (Supervisor Menkhaus) and did so at approximately 2:50 p.m.

Officers Schweinfus and Fowler met with Supervisor Menkhaus and informed him of the possibility of some weapons in A-Block. More specifically, Supervisor Menkhaus was told that the information had been communicated by inmate Hearst who said that two inmates "may" or "possibly" have shanks. Supervisor Menkhaus, who did not know inmate Hearst, was told that one of the inmates who "possibly" had a shank was Zuern.

Supervisor Menkhaus met with Supervisor York at approximately 4:00 p.m. to discuss what steps should be taken in response to the aforementioned information. It was decided, in order that the search could be done under the safest circumstances, to wait until 10:00 p.m. to do the search. More specifically, the search was delayed so that it could be done when the facility was secure (all inmates locked in their cells) and the supervisors had available to them the greatest possible number of officers to conduct the searches.

All officers would know that Zuern was charged with murder. Pence knew that Zuern was charged with murder and he (Pence) stated "we'll take the guy in [cell] 10, we'll take the murderer."

At 10:00 p.m. four officers (including Pence) were called into Supervisor Menkhaus' office. Those officers were told what inmate Hearst had stated and were directed to conduct a search of the cells of the two inmates alleged to have shanks and two other cells to be chosen at random. Neither Supervisor York nor Supervisor Menkhaus specifically directed

Pence to search Zuern's cell, but left the decision of who would search which cells to the four officers. Protective shields were available to the officers in conducting a search of an inmate's cell.

The four officers left Supervisor Menkhaus' office to conduct the searches and Supervisor York followed seconds later. When Pence and Officer Burton arrived at Zuern's cell, Zuern was on his bunk with a sheet over him. As Officer Burton began to open the door Zuern started to get up and then Zuern, with a shank in his hand, lunged out. At this time Supervisor York arrived at A-Block, heard Pence yell and saw Pence jump back from the cell. Officer Burton promptly reclosed the cell door.

When Officers Burton and Pence had approached Zuern's cell, Officer Burton opened the cell door slightly and Zuern immediately thrust his hand through the small opening. The time it took from the opening of the cell door until Officer Burton slammed it shut was no more than two (2) seconds. Officers Burton and Pence approached Zuern's cell very carefully and both were aware of the potential danger involved in searching Zuern's cell. The stabbing of Pence was unavoidable. Pence died as the result of being stabbed by Zuern. The origin of the shank used by Zuern has never been established.

V. The Role of Respondents.

Prior to the stabbing of Pence, Respondents Stokes, Carrelli, Montgomery, Withworth, Grothaus, Brockmeyer and the Commissioners had no direct contact with Zuern. Furthermore, prior to June 9, 1984 these Respondents were not aware that Zuern:

1. had a shank;
2. intended to harm anyone; or
3. was assaultive.

Further, these Respondents did not learn about inmate Hearst's "tip" (that Zuern may have a weapon) until *after* the stabbing of Pence.

Respondent Montgomery did not become employed by Respondent Stokes until May 17, 1984 — only a little more than 3 weeks before Pence's death. During that three-week period in which he familiarized himself with Hamilton County, Ohio's correctional system, Montgomery never met or heard of Pence or Zuern and he had nothing to do with Pence's training.

Like Montgomery, the Commissioners were not aware of Pence or Zuern, let alone that Zuern might stab Pence. Petitioner even admits that the Board of County Commissioners had no knowledge of Zuern and his alleged propensities for violence. Further, the Commissioners do not and have never participated in the operation of C.C.I. On June 4, 1987 a Notice of Suggestion of Death was filed concerning the death of Respondent Withworth, who was being sued in his official capacity.

B. HISTORY OF PROCEEDINGS AND FEDERAL QUESTIONS RAISED BY PETITIONER.

On May 30, 1985, Petitioner Evelyn Pence ("Petitioner") filed a Complaint in Hamilton County, Ohio Court of Common Pleas on her own behalf and as Personal Representative and Administratrix of the Estate of Phillip Pence, Deceased. Petitioner based her complaint on several state law claims, as well as a claim that Respondents had deprived Phillip Pence of life and liberty without due process of law, in violation of 42 U.S.C. Section 1983. Respondents filed a Motion for Summary Judgment in October, 1986, which was granted by the Trial Court on January 29, 1988. The Trial Court found that the Respondents were immune from liability on the state law claims under the Worker's Compensation laws in Ohio; that there was no genuine issue of fact to be submitted to the Court; and that all Respondents were entitled to Judgment as a matter of law. (Petitioner's Appendix, page 11a).

On February 1, 1988, Petitioner appealed the Trial Court's judgment to the First Appellate District (Hamilton County) of Ohio. Petitioner stated her Fourth Assignment of Error as follows:

> THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT, IN GRANTING APPELLEES' MOTION FOR SUMMARY JUDGMENT ON THE CAUSE OF ACTION EXISTING UNDER 42 U.S.C. SECTION 1983.

After briefing and oral argument, the First Appellate District affirmed the Trial Court's judgment on February 15, 1989, as follows:

> "Finally, appellant asserts that her claim for relief pursuant to Section 1983, Title 42, U.S. Code was erroneously terminated by summary judgment in favor of the appellees. We disagree.
>
> A review of the evidentiary material in support of and opposed to the summary judgment discloses no genuine issue of material fact relevant to the claim that the appellees, under color of law, deprived the appellant's decedent of federal constitutional or statutory rights.
>
> The conduct of appellees of which appellant complains amounts at most to an allegation of a lack of due care that does not state a claim under Section 1983. See *Davidson* v. *Cannon* (1986), 474 U.S. 344, ____, 106 S.Ct. 668, 671."

On April 10, 1989, Petitioner filed a Memorandum in Support of Jurisdiction with the Supreme Court of Ohio, seeking review of both the state law claims and the federal Section 1983 claim.

After an opposing memorandum was filed by Respondents on May 5, 1989, the Supreme Court of Ohio dismissed Petitioner's appeal on June 7, 1989 for the reason that no substantial constitutional question existed therein. (Petitioner's Appendix, page 1a).

REASONS FOR DENYING THE WRIT

I. THE PROCEDURE FOR THE GRANTING OF SUMMARY JUDGMENT IS SETTLED LAW, AND WAS FOLLOWED BY THE LOWER COURTS.

This Court decided a "summary judgment triology" of cases in its 1986 term wherein it was made more difficult to oppose summary judgment motions. Plaintiffs face increasing burdens of demonstrating that fact issues preclude summary judgment. This Court now demands that Plaintiffs present evidence which would be admissible at trial in sufficient quantity and of such quality that a jury could reasonably find in plaintiff's favor on that issue. Trial courts are required to evaluate the reliability of persuasive value of evidence offered in opposition to summary judgment, as well as requiring that the plaintiffs point to specific non-hearsay evidence in their responsive memorandum.

The party opposing summary judgment has the burden of showing that there is evidence which creates genuine fact disputes on issues which it is obligated to prove at trial. The moving party need not negate the existence of a fact dispute in order to prevail on summary judgment. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986).

In *Anderson* v. *Liberty Lobby*, 447 U.S. 242, 106 S.Ct. 2505 (1986), this Court held that a dispute about a material fact is "genuine" only "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." 477 U.S. at 248. Thus, the availability of summary judgment must turn on the *quality*, and not the quantity, of evidence supporting the non-moving party's case.

Opponents of summary judgment must point to "specific facts" showing that there is a *genuine issue for trial.*" *Matsushita Electric Industry Co., Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 547, 1065 S.Ct. 1348, 1356 (1986) (emphasis in original).

This Court's insistence that opponents of summary judg-

ment set forth the "specific facts" restates an earlier admonition in a Section 1983 case that a plaintiff opposing summary judgment cannot "play dog in the manger." *Butz* v. *Economou*, 438 U.S. 478, 508 (1978). In Section 1983 litigation, plaintiffs may not rely upon the following to defeat summary judgment:

a. Allegations in pleadings. [". . . an adverse party may not rest upon the mere averments or denials of the adverse partys' pleading," Fed.R.Civ.P. 56(e)]. *See*, *Griffin* v. *Hilke*, 804 F.2d 1052, 1055 n.1 (8th Cir. 1986) (plaintiffs opposing j.n.o.v. cannot rely on pleadings alleging unconstitutional behavior, where they offer no evidence they could prove such actionable misconduct).

b. Unsupported charges of malice or "bald assertions" of conspiratorial purpose or improper state of mind. *Myers* v. *Morris*, 810 F.2d 1437 (8th Cir. 1987). *See also Rodgers* v. *Lincoln Towing Service, Inc.*, 771 F.2d 194, 202 (7th Cir. 1985) (dismissing "boilerplate allegations . . . entirely lacking in any factual support. . . .").

c. In fact, filing unsupported allegations can justify the imposition of sanctions under Fed.R.Civ.P. 11 and 42 U.S.C. Section 1988. *See*, *Rodgers* v. *Lincoln Towing Service, Inc.*, 771 F.2d at 204-6; *Stewart* v. *City of Chicago*, 622 F.Supp. 35 (N.D. Ill. 1985).

In Ohio, the summary judgment procedure is virtually identical to the federal rule. (See Appendix, page 1a). The Ohio Supreme Court is consistent with this Court's interpretation of Ohio Rules for Civil Procedure, Rule 56. *See Van Fossen* v. *Babcock & Wilcox Co.* (1988), 36 OhioSt.3d 100, 522 N.E.2d 489; *Mitchell* v. *Lawson Milk Co.* (1988), 40 OhioSt.3d 190, 532 N.E.2d 753.

The uncontroverted facts of this case clearly demonstrated that if a weapon had actually been seen by an officer, im-

mediate action would have been taken. A search for a weapon that "might" exist, should not begin until the jail facility was secure. In this case, this would occur when all inmates were locked in their cells; and with the most available manpower; when two officers, and at times a supervisor, would be sent to each cell; and the search would not begin until the inmate had left the cell and one of the officers had the inmate secured. The Petitioner has claimed that:

> "Respondents were warned as early as 4:00 p.m. that inmate William Zuern ('Zuern') may have possessed one of the deadly shanks. However, no search was ordered for Zuern's cell until 10:00 p.m." (Petition for Writ of Certiorari, page 4.)

Her argument seems to be that this time delay caused the death of Officer Pence. However, *there was no evidence before the trial court that Respondents decided to conduct a search of Zuern at a later time in order to increase the danger to Officer Pence.*

It was based upon these facts that the trial court decided the summary judgment motion, in compliance with Ohio law. See Petitioner's Appendix, page 12a.

II. THERE IS NO CONFLICT AS TO THE LAW TO BE APPLIED IN A DUE PROCESS CLAIM.

The State Court of Appeals, upon full review of the record before the trial court, specifically found that the "conduct of (Respondents) of which (Petitioner) complains amounts at most to an allegation of a *lack of due care* that does not state a claim under Section 1983" (Petitioner's Appendix, page 8a).

In *Daniels* v. *Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), this Court concluded "that the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty or

property." *Id.* at S.Ct. 663. "Upon reflection, we agreed and overrule *Parrott* to the extent that it states that mere lack of due care by a state official may 'deprive' an individual of life, liberty or property under the Fourteenth Amendment." *Id.* at S.Ct. 665. In *Davidson* v. *Cannon*, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986), this Court stated: "As we held in *Daniels*, the protections of the Due Process Clause, whether procedural or substantive, are just not triggered by lack of due care by prison officials." *Id.* at S.Ct. 671. *See also*, *Johnston* v. *Lucas*, 786 F.2d 1254 (5th Cir. 1986); *Walker* v. *Rowe*, 791 F.2d 507 (7th Cir. 1986).

The Sixth Circuit has addressed the issue of when an employee in a prison setting can bring an action under *Section 1983*. In *Hayes* v. *Vessey*, 777 F.2d 1149 (6th Cir., 1985), the plaintiff, a teacher at a correctional institution, was raped by an inmate and she sued several prison officials. She maintained that they were responsible because they: ignored high levels of tension; condoned an attitude of indifference toward danger to employees; failed to maintain adequate security for employees; assigned the plaintiff to work in an area more dangerous than others; and failed to install equipment that would have made the prison more safe. The Sixth Circuit ruled that the plaintiff failed to state a claim stating that there could be no liability for the random act of an inmate.

The above decison makes clear that the Petitioner in this action is unable to establish that Pence was "deprived" within the meaning of the due process clause and, accordingly, the *Section 1983* action.

III. THE PETITION DOES NOT RAISE ANY IMPORTANT QUESTION THAT NEEDS TO BE ADDRESSED BY THE COURT.

Respondents submit that this case involves two (2) issues, both of which have been authoritatively determined by this Court and the highest court of the State of Ohio.

Summary Judgment

After "having considered the pleadings in the action, the Memorandum filed by counsel and the Affidavits, Depositions and Interrogatories relied upon therein and filed with the Court," the trial court specifically "found that there is no genuine issue of fact" and that the Respondents "are entitled to judgment as a matter of law." (Petitioner's Appendix, page 12a.)

In upholding the decision of the trial court, the Court of Appeals for the First Appellate District of Ohio found that a "review of the evidentiary material in support of and opposed to the summary judgment discloses no genuine issue of material fact to the claim that the (Respondents), under color law, deprived the (Petitioner's) decedent of federal constitutional or statutory rights." (Petitioner's Appendix, page 8a.)

The Supreme Court of Ohio dismissed the Petitioner's appeal "for the reason that no substantial constitutional question exists therein." (Petitioner's Appendix, page 1a.)

Because the above procedures were correct, Petitioner is now requesting this Court to undertake a review of the evidentiary findings, previously passed upon by all three levels of the state courts of Ohio. As Petitioner admits, "it is the exception, rather than the rule, for the Court to undertake a review of evidentiary findings."

42 U.S.C. Section 1983

There is no conflict, between the parties or otherwise, that the protections of the Due Process Clause, whether procedural or substantive, are just not triggered by lack of due care by prison officials. *Daniels* v. *Williams*, *supra; Davidson* v. *Cannon*, *supra.*

The Court of Appeals for the First Appellate District found, after a "review of the evidentiary material in support of and opposed to the summary judgment (that the) conduct of (Respondents) of which (Petitioner) complains amounts at

most to an allegation of a lack of due care. . . ." (Petitioner's Appendix, pages 7a, 8a.)

Simply put, this case does not involve any question requiring the exercise of this Court's guidance, as claimed in the petition. The findings and determinations made by the state courts, which Respondents believe to be correct, do not warrant this Court's attention.

CONCLUSION

Based upon the foregoing, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ARTHUR M. NEY, JR.
Prosecuting Attorney
of Hamilton County, Ohio

ROBERT E. TAYLOR
Counsel of Record
Ass't Prosecuting Attorney
of Hamilton County, Ohio
(513) 632-8429

JAMES W. HARPER
Ass't Prosecuting Attorney
of Hamilton County, Ohio
420 Hamilton County Courthouse
Cincinnati, Ohio 45202

Attorneys for Respondents

APPENDIX

OHIO RULES OF CIVIL PROCEDURE

RULE 56. Summary judgment

(A) For party seeking affirmative relief. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of the time permitted under these rules for a responsive motion or pleading by the adverse party, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. If the action has been set for pre-trial or trial, a motion for summary judgment may be made only with leave of court.

(B) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(C) Motion and proceedings thereon. The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party prior to the day of hearing may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable

minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(D) Case not fully adjudicated upon motion. If on motion under this rule summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court in deciding the motion, shall examine the evidence or stipulation properly before it, and shall if practicable, ascertain what material facts exist without controversy and what material facts are actually and in good faith controverted. The court shall thereupon make an order on its journal specifying the facts that are without controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established and the trial shall be conducted accordingly.

(E) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(F) When affidavits unavailable. Should it appear from

the affidavits of a party opposing the motion for summary judgment that he cannot for sufficient reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

(G) Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO. A-85-04201
(J. Nurre)

EVELYN PENCE,

Plaintiff,

vs.

BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY, ET AL.,

Defendants.

NOTICE OF SUGGESTION OF DEATH OF WILLIAM WITHWORTH
(Filed June 4, 1987)

Counsel for defendants, pursuant to Rule 25, O.R.C.P., hereby provides notice of the suggestion of death of defendant William Withworth.

/s/ ARTHUR M. NEY, JR.
Prosecuting Attorney
Hamilton County, Ohio

/s/ BRIAN E. HURLEY (H450)
Assistant Prosecuting Attorney
Hamilton County, Ohio

420 Hamilton County Courthouse
1000 Main Street
Cincinnati, Ohio 45202
(513) 632-8429

Counsel for Defendants

[DULY CERTIFIED]

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO. A-8504201

EVELYN PENCE, Individually and as Personal Representative and Administratrix of the Estate of Phillip J. Pence, Deceased,

Plaintiff,

vs.

BOARD OF COUNTY COMMISSIONERS, OF HAMILTON COUNTY, et al.,

Defendants.

AFFIDAVIT OF ROBERT A. TAFT, II

STATE OF OHIO)
) ss:
COUNTY OF HAMILTON)

Robert A. Taft, II, being duly sworn, deposes and states that:

1. He is a duly elected member of the Board of County Commissioners of Hamilton County, Ohio and he held that position on June 9, 1984.

2. He is a named defendant in the above-captioned action.

3. He had nothing to do with the hiring or training of Phillip Pence.

4. He had no contact, direct or indirect, with Phillip Pence while he was employed by the Hamilton County, Ohio Sheriff's Department.

5. Prior to his death, he had no knowledge that Phillip Pence was employed by the Hamilton County, Ohio Sheriff.

6. Prior to incarceration at C.C.I., he did not know or

know of, nor, to the best of his knowledge, did he ever have any contact with him.

7. He had no authority to and did not participate in the operation of C.C.I. while a member of the Board of County Commissioners of Hamilton County, Ohio.

8. Prior to June 9, 1984 he had no information that William Zuern:

a. had a shank;
b. intended to harm an inmate or a correctional officer; or
c. was assaultive.

9. He did not learn that inmate Loyal Hearst had informed correctional officers that William Zuern may have a shank until after Phillip Pence had been stabbed.

/s/ ROBERT A. TAFT, II

[DULY NOTARIZED]

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO. A-8504201

EVELYN PENCE, Individually and as Personal Representative and Administratrix of the Estate of Phillip J. Pence, Deceased,

Plaintiff,

vs.

BOARD OF COUNTY COMMISSIONERS, OF HAMILTON COUNTY, et al.,

Defendants.

AFFIDAVIT OF NORMAN A. MURDOCK

STATE OF OHIO)
) ss:
COUNTY OF HAMILTON)

Norman A. Murdock, being duly sworn, deposes and states that:

1. He is a duly elected member of the Board of County Commissioners of Hamilton County, Ohio and he held that position on June 9, 1984.

2. He is a named defendant in the above-captioned action.

3. He had nothing to do with the hiring or training of Phillip Pence.

4. He had no contact, direct or indirect, with Phillip Pence while he was employed by the Hamilton County, Ohio Sheriff's Department.

5. Prior to his death, he had no knowledge that Phillip Pence was employed by the Hamilton County, Ohio Sheriff.

6. Prior to incarceration at C.C.I., he did not know or

know of, nor, to the best of his knowledge, did he ever have any contact with him.

7. He had no authority to and did not participate in the operation of C.C.I. while a member of the Board of County Commissioners of Hamilton County, Ohio.

8. Prior to June 9, 1984 he had no information that William Zuern:

a. had a shank;
b. intended to harm an inmate or a correctional officer; or
c. was assaultive.

9. He did not learn that inmate Loyal Hearst had informed correctional officers that William Zuern may have a shank until after Phillip Pence had been stabbed.

/s/ NORMAN A. MURDOCK

[DULY NOTARIZED]

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO. A-8504201

EVELYN PENCE, Individually and as Personal Representative and Administratrix of the Estate of Phillip J. Pence, Deceased,

Plaintiff,

vs.

BOARD OF COUNTY COMMISSIONERS, OF HAMILTON COUNTY, et al.,

Defendants.

AFFIDAVIT OF JOSEPH M. DECOURCY

STATE OF OHIO)
) ss:
COUNTY OF HAMILTON)

Joseph M. DeCourcy, being duly sworn, deposes and states that:

1. He is a duly elected member of the Board of County Commissioners of Hamilton County, Ohio and he held that position on June 9, 1984.

2. He is a named defendant in the above-captioned action.

3. He had nothing to do with the hiring or training of Phillip Pence.

4. He had no contact, direct or indirect, with Phillip Pence while he was employed by the Hamilton County, Ohio Sheriff's Department.

5. Prior to his death, he had no knowledge that Phillip Pence was employed by the Hamilton County, Ohio Sheriff.

6. Prior to incarceration at C.C.I., he did not know or

know of, nor, to the best of his knowledge, did he ever have any contact with him.

7. He had no authority to and did not participate in the operation of C.C.I. while a member of the Board of County Commissioners of Hamilton County, Ohio.

8. Prior to June 9, 1984 he had no information that William Zuern:

a. had a shank;
b. intended to harm an inmate or a correctional officer; or
c. was assaultive.

9. He did not learn that inmate Loyal Hearst had informed correctional officers that William Zuern may have a shank until after Phillip Pence had been stabbed.

/s/ JOSEPH M. DECOURCY

[DULY NOTARIZED]

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO. A-8504201

EVELYN PENCE, Individually and as Personal Representative and Administratrix of the Estate of Phillip J. Pence, Deceased,

Plaintiff,

vs.

BOARD OF COUNTY COMMISSIONERS, OF HAMILTON COUNTY, et al.,

Defendants.

AFFIDAVIT OF LINCOLN J. STOKES

STATE OF OHIO)
) ss:
COUNTY OF HAMILTON)

Lincoln J. Stokes, being duly sworn, deposes and states that:

1. He is the duly elected Sheriff of Hamilton County, Ohio and has held that position since January 3, 1977.

2. Prior to June 9, 1984 he had no direct contact with William Zuern.

3. Prior to June 9, 1984 he had no information that William Zuern:

a. had a shank;
b. intended to harm an inmate or a correctional officer; or
c. was assaultive.

4. He did not learn that inmate Loyal Hearst had in-

formed correctional officers that William Zuern may have a shank until after Phillip Pence had been stabbed.

5. He at no time took any deliberate action that he believed would result in an injury to Phillip Pence.

6. Prior to the stabbing of Phillip Pence, he did not participate in the booking, examination, handling or supervision of William Zuern during his incarceration at the Community Correctional Institute (C.C.I.).

7. Prior to the stabbing of Phillip Pence, he did not give any orders or directives to subordinates in connection with the booking, examination, handling or supervision of William Zuern during his incarceration at C.C.I.

8. Prior to the stabbing of Phillip Pence, he had no actual knowledge as to how his subordinates performed the tasks of booking, examining, handling and supervision of William Zuern during his incarceration at C.C.I.

/s/ LINCOLN J. STOKES

[DULY NOTARIZED]

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO. A-8504201

EVELYN PENCE, Individually and as Personal Representative and Administratrix of the Estate of Phillip J. Pence, Deceased,

Plaintiff,

vs.

BOARD OF COUNTY COMMISSIONERS, OF HAMILTON COUNTY, et al.,

Defendants.

AFFIDAVIT OF VICTOR CARRELLI

STATE OF OHIO)
) ss:
COUNTY OF HAMILTON)

Victor Carrelli, being duly sworn, deposes and states that:

1. He is employed by the Hamilton County, Ohio Sheriff and has been so employed since January 3, 1977.

2. Prior to June 9, 1984 he had no direct contact with William Zuern.

3. Prior to June 9, 1984 he had no information that William Zuern:

a. had a shank;
b. intended to harm an inmate or a correctional officer; or
c. was assaultive.

4. He did not learn that inmate Loyal Hearst had informed correctional officers that William Zuern may have a shank until after Phillip Pence had been stabbed.

5. He at no time took any deliberate action that he believed would result in an injury to Phillip Pence.

6. Prior to the stabbing of Phillip Pence, he did not participate in the booking, examination, handling or supervision of William Zuern during his incarceration at the Community Correctional Institute (C.C.I.).

7. Prior to the stabbing of Phillip Pence, he did not give any orders or directives to subordinates in connection with the booking, examination, handling or supervision of William Zuern during his incarceration at C.C.I.

8. Prior to the stabbing of Phillip Pence, he had no actual knowledge as to how his subordinates performed the tasks of booking, examining, handling and supervision of William Zuern during his incarceration at C.C.I.

/s/ VICTOR CARRELLI

[DULY NOTARIZED]

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO. A-8504201

EVELYN PENCE, Individually and as Personal Representative and Administratrix of the Estate of Phillip J. Pence, Deceased,

Plaintiff,

vs.

BOARD OF COUNTY COMMISSIONERS, OF HAMILTON COUNTY, et al.,

Defendants.

AFFIDAVIT OF MICHAEL J. MONTGOMERY

STATE OF OHIO)
) ss:
COUNTY OF HAMILTON)

Michael J. Montgomery, being duly sworn, deposes and states that:

1. He began employment with the Hamilton County, Ohio Sheriff's Department as the Director of Corrections on May 17, 1984.

2. For the approximately 3 weeks prior to the stabbing of Phillip Pence on June 9, 1984, he was engaged in the touring of the six facilities operated by the Sheriff's office, acquainting himself with the Sheriff's administrative staff and the principle officials involved with Hamilton County, Ohio's criminal justice system, reviewing existing policies and procedures, setting up his office and establishing a work routine.

3. He never met Phillip Pence prior to June 9, 1984.

4. He had nothing to do with the hiring or training of Phillip Pence.

5. Prior to June 9, 1984 he had no direct contact with Phillip Pence.

6. Prior to June 9, 1984 he had no information that William Zuern:

a. had a shank;
b. intended to harm an inmate or a correctional officer; or
c. was assaultive.

7. He did not learn that inmate Loyal Hearst had informed correctional officers that William Zuern may have a shank until after Phillip Pence had been stabbed.

8. He at no time took any deliberate action that he believed would result in an injury to Phillip Pence.

9. Prior to the stabbing of Phillip Pence, he did not participate in the booking, examination, handling or supervision of William Zuern during his incarceration at the Community Correctional Institute (C.C.I.)

10. Prior to the stabbing of Phillip Pence, he did not give any orders or directives to subordinates in connection with the booking, examination, handling or supervision of William Zuern during his incarceration at C.C.I.

11. Prior to the stabbing of Phillip Pence, he had no actual knowledge as to how his subordinates performed the tasks of booking, examining, handling and supervision of William Zuern during his incarceration at C.C.I.

/s/ MICHAEL J. MONTGOMERY

[DULY NOTARIZED]

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO. A-8504201

EVELYN PENCE, Individually and as Personal Representative and Administratrix of the Estate of Phillip J. Pence, Deceased,

Plaintiff,

vs.

BOARD OF COUNTY COMMISSIONERS, OF HAMILTON COUNTY, et al.,

Defendants.

AFFIDAVIT OF STANLEY GROTHAUS

STATE OF OHIO)
) ss:
COUNTY OF HAMILTON)

Stanley Grothaus, having been duly sworn and based upon his personal knowledge, states that:

1. He was employed by the Sheriff of Hamilton County, Ohio Sheriff on June 9, 1984.

2. Prior to June 9, 1984 he had no direct contact with William Zuern.

3. Prior to June 9, 1984 he had no information that William Zuern:

   a. had a shank;
   b. intended to harm an inmate or a correctional officer; or
   c. was assaultive.

4. He did not learn that inmate Loyal Hearst had in-

formed correctional officers that William Zuern may have a shank until after Phillip Pence had been stabbed.

5. He at no time took any deliberate action that he believed would result in an injury to Phillip Pence.

6. Prior to the stabbing of Phillip Pence, he did not participate in the booking, examination, handling or supervision of William Zuern during his incarceration at the Community Correctional Institute (C.C.I.).

7. Prior to the stabbing of Phillip Pence, he did not give any orders or directives to subordinates in connection with the booking, examination, handling or supervision of William Zuern during his incarceration at C.C.I.

8. Prior to the stabbing of Phillip Pence, he had no actual knowledge as to how his subordinates performed the tasks of booking, examining, handling and supervision of William Zuern during his incarceration at C.C.I.

/s/ STANLEY R. GROTHAUS

[DULY NOTARIZED]

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO. A-8504201

EVELYN PENCE, Individually and as Personal Representative and Administratrix of the Estate of Phillip J. Pence, Deceased,

Plaintiff,

vs.

BOARD OF COUNTY COMMISSIONERS, OF HAMILTON COUNTY, et al.,

Defendants.

AFFIDAVIT OF ROBERT BROCKMEYER

STATE OF OHIO)
) ss:
COUNTY OF HAMILTON)

Robert Brockmeyer, having been duly sworn and based upon his personal knowledge, states that:

1. He was employed by the Hamilton County, Ohio Sheriff as a Correction Supervisor II on August 15, 1981 and was promoted to the rank of Supervisor III on August 26, 1982 and has held that position since.

2. He was not on duty on June 9, 1984.

3. Prior to June 9, 1984 he had no direct contact with William Zuern.

4. Prior to June 9, 1984 he had no information that William Zuern:

a. had a shank;
b. intended to harm an inmate or a correctional officer; or
c. was assaultive.

5. He did not learn that inmate Loyal Hearst had informed correctional officers that William Zuern may have a shank until after Phillip Pence had been stabbed.

6. He at no time took any deliberate action that he believed would result in an injury to Phillip Pence.

7. Prior to the stabbing of Phillip Pence, he did not participate in the booking, examination, handling or supervision of William Zuern during his incarceration at the Community Correctional Institute (C.C.I.).

8. Prior to the stabbing of Phillip Pence, he did not give any orders or directives to subordinates in connection with the booking, examination, handling or supervision of William Zuern during his incarceration at C.C.I.

9. Prior to the stabbing of Phillip Pence, he had no actual knowledge as to how his subordinates performed the tasks of booking, examining, handling and supervision of William Zuern during his incarceration at C.C.I.

/s/ ROBERT BROCKMEYER

[DULY NOTARIZED]

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO. A-8504201

EVELYN PENCE, Administratrix,
Plaintiff,

vs.

BOARD OF COUNTY COMMISSIONERS, et al.,
Defendant.

AFFIDAVIT OF MILTON CASIAS

STATE OF OHIO)
) ss:
COUNTY OF HAMILTON)

The affiant, Milton Casias, having been duly sworn and cautioned, deposes and states based upon his personal knowledge:

That I was employed at C.C.I. by the City of Cincinnati from October 1962 until August 15, 1981. I was subsequently employed by the Hamilton County, Ohio Sheriff's Office from August 15, 1981 to the present.

I am currently employed by the Sheriff's Office as an administrative assistant-2. Within my official duties I have personal knowledge of contents of the personnel records of Officer Pence. From those personnel records, Exhibits 1 through 6 attached are true and accurate copies of the following:

1. Pence's job description;
2. C.C.I. Corrections Officer Training Curriculum for 6-20-83;
3. Certificate reflecting the satisfactory completion by Pence of the C.C.I. Correction Officer Training Curriculum;

4. Pence's final exam for C.C.I. Correction Officer Training Curriculum;
5. Pence's Graduation Checklist — Undergraduate; and
6. Pence's Bachelor of Science Diploma

Pence's personnel records show that he satisfactorily completed the C.C.I. Officer Training program given between June 20 and 30, 1983 consisting of 72 hours of training. The content of this training is reflected in the Exhibit #2 attached.

I made an investigation of stabbing incidents at C.C.I. from 1962 to 1981. There was only one stabbing on file. That incident involved two inmates and did not occur in the "A-Block" section of C.C.I.

I have made an investigation as to the number of inmates housed in "A-Block" of C.C.I. from August 15, 1981 until June 9, 1984. This data was collected under my direction by deputy sheriffs, Robert W. King, Barry L. Cunningham, Mark Schoonover and Supervisor Harold Jones.

I participated in gathering of the information to the extent that I aided Supervisor Harold Jones in preparing the first nine sheets of names from daily attendance logs and in researching these names in the C.C.I. record books. I noted the Revised Code number of the offense, while Supervisor Jones noted the name of the offense on the sheets. Upon completion of the research, these sheets were given by me to Deputy Barry A. Cunningham for inclusion in his offense tabulation sheets.

I prepared, with the aid of Supervisor Jones and a representative of the Prosecutor's Office a list of those offenses which constitute offenses of violence under Ohio law. I then prepared the offense tabulation sheets used by the deputies in recording their findings as to offense type.

I instructed the deputies Cunningham, Schoonover and King that where a case history indicated more than one category of offense of violence, that the name should be listed only once with a reference being made on the sheet to those other offenses by category number.

Upon completion, all sheets and data were turned over to me for tabulation.

According to daily A-Block prisoner rosters from August 15, 1981 until June 9, 1984, C.C.I. housed 1661 prisoners in the maximum security A-Block.

Of the 1661 prisoners, 455 did not have records in our archive, so the nature of the charges with which they were charged or convicted cannot be derived currently with accuracy.

Of the remaining 1206 prisoners for whom records exist 439 were housed in A-Block because they were accused or convicted of crimes of violence as defined by O.R.C. § 2901.01 (I)(1).

By offense type, the inmates were held on the following charges:

2903.01 — Aggravated Murder	— 5
2903.02 — Murder	— 11
2903.11 — Felonious Assault	— 45
2903.12 — Aggravated Assault	— 10
2923.12 — Carrying Concealed Weapon	— 31
2923.13 — Weapon Under Disability	— 4
2921.34 — Escape/Aiding Escape	— 64
2905.02(.02), (.11) — Kidnap, Abduction, Extortion	— 9
2903.13 — Assault	— 64
2903.21 — Aggravated Menacing/Menacing	— 18
2911.01 — Aggravated Robbery	— 75
2911.02 — Robbery	— 60
2907.02 — Rape	— 44
2919.25 — Domestic Violence	— 6
2903.03 — Voluntary Manslaughter	— 2
2909.02 (.03) — Aggravated Arson/Arson	— 4
2911.11 (.12) — Aggravated Burglary, Burglary	— 79
2921.03 — Intimidation	— 1

Of the 89 persons had multiple charges of violent offenses, increasing to total number of charges to 533.

The information relating to the offender, William Zuern, was done by myself because his case file was not available to the deputies doing the research.

Further affiant sayeth naught.

/s/ MILTON CASIAS

[DULY NOTARIZED]

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO. A-8504201

EVELYN PENCE, Individually and as Personal Representative and Administratrix of the Estate of Phillip J. Pence, Deceased,

Plaintiff,

vs.

BOARD OF COUNTY COMMISSIONERS, OF HAMILTON COUNTY, et al.,

Defendants.

AFFIDAVIT OF KENNETH SCHWEINFUS

STATE OF OHIO)
) ss:
COUNTY OF HAMILTON)

Kenneth Schweinfus, having been duly sworn and based upon his personal knowledge, states that:

1. He has been employed by the Hamilton County, Ohio Sheriff as a correctional officer since August 15, 1981.

2. It is not an unusual occurrence to be informed by an inmate of the existence of a weapon in a facility. In addition, very often that information is inaccurate.

3. Prior to the stabbing of Phillip Pence, he (Schweinfus) had contact with William Zuern and he is not aware of Zuern's having committed any violent acts at C.C.I. during that time.

/s/ KENNETH SCHWEINFUS

[DULY NOTARIZED]

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO. A-8504201

EVELYN PENCE, Individually and as Personal Representative and Administratrix of the Estate of Phillip J. Pence, Deceased,

Plaintiff,

vs.

BOARD OF COUNTY COMMISSIONERS, OF HAMILTON COUNTY, et al.,

Defendants.

AFFIDAVIT OF ROBERT MENKHAUS

STATE OF OHIO)
) ss:
COUNTY OF HAMILTON)

Robert Menkhaus, having been duly sworn and based upon his personal knowledge, states that:

1. He has been employed by the Hamilton County, Ohio Sheriff as a correctional officer since March 11, 1982. Prior to his employment with Hamilton County, Ohio, he had been employed by the City of Cincinnati from 1967-1982.

2. Phillip Pence was present when many cell searches were performed correctly and he (Pence) was fully aware of how to do a search correctly and safely. More specifically, Pence knew that before a correctional officer entered a cell the inmate was to be instructed to turn around, clasp hands and place them behind his head and to back out of the cell.

/s/ ROBERT MENKHAUS

[DULY NOTARIZED]

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO. A-8504201

EVELYN PENCE, Individually and as Personal Representative and Administratrix of the Estate of Phillip J. Pence, Deceased,

Plaintiff,

vs.

BOARD OF COUNTY COMMISSIONERS, OF HAMILTON COUNTY, et al.,

Defendants.

AFFIDAVIT OF DOUGLAS BOWMAN

STATE OF OHIO)
) ss:
COUNTY OF HAMILTON)

Douglas Bowman, having been duly sworn and based upon his personal knowledge, states that:

1. He is employed by the Hamilton County, Ohio Sheriff as a correctional supervisor and has held that position since 8/15/81.

2. He was an instructor during the 72 hour training program ("Training Program") provided Phillip Pence in connection with his (Pence) employment as a Hamilton County, Ohio correctional officer.

3. The thrust of all aspects of the Training program was that a correctional officer must do everything possible to prevent an inmate from gaining an advantage over the correction officer.

4. The Training Program included one-half day on general security techniques and another half-day on the when

and how of cell searches. In connection with the training provided with respect to the search of cells, Phillip Pence (along with the other trainees) was taught how to protect himself, shown two instructional films on how to search cells and was also given a "hands-on" training on how to conduct a frisk/body search.

5. Throughout the Training Program Pence (and the other trainees) were taught that the top two priorities were the safety of officers and the safety of inmates.

6. Prior to the stabbing of Pence, he had contact with William Zuern. Zuern was no trouble and gave no indication of being violent. Zuern did nothing to lead him to believe that he (Zuern) was a problem.

/s/ DOUGLAS BOWMAN

[DULY NOTARIZED]

EXCERPTS FROM DEPOSITION TESTIMONY

M. Joseph Burton

[3] Q. Officer, would you state your name and also your address, please?

A. Joseph Burton, 4024 West Liberty Street, Cincinnati.

Q. What is your occupation?

A. Deputy sheriff assigned as a corrections officer.

* * *

[11] Q. Okay. Now, did you have any knowledge yourself about Zuern — about William Zuern before Philip was killed?

A. None whatsoever. As far as a person — you're talking about personal contact?

Q. Right.

A. No.

Q. What about did you have any knowledge of his reputation before Philip was killed by him out there?

A. Yes, I knew he was in there on a murder charge, but working at the bond and hold area I'm the one that kept the records of everybody that was there and I knew he was there on a high bond for a murder charge.

Q. And he was assigned to Block A, was he?

A. Yes, sir.

Q. Did you know anything else about the murder charge he was there on, any of the details about it or anything, or just the fact he was there on a murder charge?

A. Yes, I knew the details.

[12] Q. How did you have the occasion to know the details?

A. Through the press.

Q. Before he got down there? Before he came down there?

A. Yes, I had heard of him before when the — he first allegedly killed the guy over on State Avenue.

* * *

Q. When a prisoner came in and was assigned to A [13] Block, for example, would any information on what he was charged there — charged with, why he was there, would that be disseminated to the guards who were in the A Block?

A. Yes.

Q. Okay. Was that done as a matter of routine?

A. Yes.

* * *

[15] Q. Okay. And so when — on that day in question you came to work at about what time?

A. My hours were 3:00 to 11:00.

Q. 3:00 to 11:00?

A. Yeah.

Q. Was Philip working the same shift?

A. Yes.

Q. Okay. And you say that you did participate in the shakedown of Cell Block A?

A. Yes, I did.

Q. Now, when did you first know that a shakedown was going to be conducted?

A. At approximately 10:00 p.m.

Q. Who told you about it? How did you find out about it?

A. Lieutenant York informed us — informed me.

Q. What did he tell you about it?

[16] A. He told me that — that we were to report to A Block and assist the A Block officers in helping shake down a few inmates; they had rumors of a weapon, somebody might have a weapon.

Q. They had rumors of a weapon?

A. Yeah.

Q. Did he tell you who that was?

A. No.

Q. Okay. Did — where was — if you know, where was Philip Pence at the time?

A. Him and I were together.

Q. Was he in the bond and hold area?

A. At the time, yes.

Q. Okay. He wasn't assigned there, he happened to be there?

A. No. It was after lockup time. He just finished locking up the block.

Q. We had two other officers' testify, Officer Pryor and Elam, too. Were they also signed to participate in the shakedown?

A. Yes.

Q. Okay. Now, did they proceed to Cell Block A before you and Philip Pence did, do you recall?

A. The best I can remember, we all pretty much [17] went over at the same time, but, you know, one of them might have been ahead of us, but the best I can remember, we all went at the same time.

Q. Were you given any information by your supervisors, either Supervisor York or Menkhaus, as to how long they had knowlege that Zuern had a weapon in his possession or may have had a weapon?

A. No — Would you repeat that question?

Q. Yes. When you went and you were told by your supervisors that you were going to conduct — that you were going to be assigned to participate in the shakedown, did they say how long they had knowlege that there may have been a weapon in Zuern's possession?

A. No.

Q. Did they give you any instructions about how to shake down as you went — as you and the other men went over there?

A. No.

Q. Did they say that there was definitely a weapon there or did they just say there was a rumor there was a weapon?

A. They didn't say there was definitely a weapon, no.

Q. And do you recall who the other two officers [18] were besides you and Philip Pence when you went over there?

A. Other than the A Block officers?

Q. Well, yes, other than the A Block officers.

A. Yes, Deputy Pryor and Deputy Gary Roush.

Q. Who were the A Block officers that were assigned?

A. Deputy Doug Elam and Deputy Ron Doyle.

Q. Were there just two men assigned to A Block?

A. Yes.

Q. And what time was it in the evening when this occurred, when you were asked to do this?

A. Approximately twenty after ten p.m.

Q. Okay. Now, when you got over there, how did — I assume there were six men over there, six corrections officers over there at some point in time?

A. Yes.

* * *

[22] Q. How did you and Philip then proceed to shake down the cell at that point in time?

A. Okay. We told the inmate to get up because we were going to search him and then —

Q. Was he asleep or awake?

A. I couldn't tell if he was asleep or not because he was lying — the way he was laying, his face was sort of in the shadows sort of in the corner of the cell, but it would be safe to say he was awake because as soon as we told him to get up, he got right up.

Q. How was he dressed?

A. He was — he wasn't dressed. He was nude.

Q. When he got up, did he bring his sheet up with him or —

A. No, he left it on his bunk.

Q. Were you able to see any objects in his hands?

A. No.

Q. What did he do then? Did he approach the gate?

[23] A. He approached the bar — the door, and we informed him that when we opened the door he was to step out and put his hands against the wall, and Deputy Pence had the cell door key.

He unlocked the door, and he gave the key to Deputy Pryor, who was going to search someone else, and I had my hands on the bar. I was still holding the door closed, and Phil stepped back a couple of steps and I asked him, are you

ready? He said, yes. So I started to open the door, and as I got the door open, Zuern just lunged at him with the shank and stabbed him. As I was trying to slam his hand into the door, he got back just in time into his cell and I held the cell door closed until I got — until Deputy Pryor brought the key over and locked it back.

Q. Did Zuern try to get out again?

A. I don't believe he really tried to get out. I did feel a little pressure on the door, but I don't think he was trying to get back out.

Q. Where was the weapon at that time, if you know?

A. I never did see the weapon. He had it in his hand apparently when we opened the door. Apparently, he had it hidden in his hand.

Q. Were you able to see that in any way?

A. No.

[24] Q. And as the doors open, do they swing out or do they open sideways?

A. They swing out.

Q. So they swing out, not in the cell?

A. Right.

Q. Now, prior to the time that you and Philip and the other men went down there to shake down the cell, were you given any instructions by supervision to take any type of protective equipment down there with you?

A. No.

Q. And was there any of that material available to you, if you know?

A. There were some Plexiglas — I think they're made out of Plexiglas — shields that we use in times of inmate problems, you know, when they're being abusive to officers or they get unruly and if — if we need them, we can go get them at the turnkey area whenever there's any violence of any kind.

* * *

N. Stever Pryor

[3] Q. You're Officer Steve Pryor, I presume?
A. Yes, I am.
Q. That's P-r-y-o-r?
A. Right.

* * *

[11] Q. What did you do when you got over there?
A. Okay. We asked Doyle — I can't remember if it was Doyle or Elam — what the guys' names were, and they told us Zuern and this other guy. I forget his name, and Gary and myself checked the roster to see where they were located and Zuern was in 10 and I believe the other guy was in 16, Cell 16, all on the first level, and by that time Burton and Pence were already over there.
Q. All right. Now, at that time did — when you were checking the cells as to where they were, did you look in the cells?
A. No, no. We were at the officer's desk.
Q. Okay. And did you proceed to the cells before Phil and the other officer came? Did you proceed to move out to where the cells where?
A. We asked then which cell they wanted. I believe Gary Roush made the comment that Zuern was in 10, he was the murderer, and Phil says, okay, we'll take the guy in 10, we'll take the murderer.

* * *

[15] Q. Now, then, you proceeded on down to the other cell where the other area was that you were going to shake down, right?
A. Okay. I heard Phil say, we're going to shake you down.
Q. To Zuern?
A. Right. And Zuern stood up, Phil unlocked the door and he tossed me the cell door key and then Gary and I started walking down towards the other cell.
Q. What did you notice next?

A. We walked about four more feet and I heard [16] somebody yell and then at first I thought Zuern rushed him. You know, when I heard him yell I turned around because I thought he rushed him and I seen Phil going back, grabbing his chest.

Q. Where was he? Was he outside the cell?

A. He was outside the cell.

Q. When you turned around, how far was he away from the cell opening?

A. When I — I would say about two feet because he was going back, grabbing his chest, and Joe slammed the door real quick — Burton slammed the door and he said, where's the key, and I had the key. So I rushed up there and locked it. Joe was holding the door shut.

Q. What was Zuern doing?

A. He was just sitting on his bed and we asked Phil how he was doing — we asked him if he was okay and he just kind of shook his head yeah.

Q. And then did you proceed to shake down the other cell?

A. Negative. No.

Q. Never did?

A. No, no. You know, because we were worried about Phil.

* * *

O. James O. York

[4] Q. For the record, would you state your name and occupation, please.

A. James O. York, Corrections Supervisor II for Hamilton County.

* * *

[5] Q. And back on June 9, 1984, you received knowledge of the possibility that William Zuern may have a weapon in his cell; is that right?

A. I received word after my relief had started that one of two inmates — Zuern happened to be one of them — might [6] possibly have a weapon.

Q. Who was the other inmate?

A. I believe his last name was Allen. If you have my report, it's in there.

Q. A-l-l-e-n?

A. I believe it is.

Q. I don't know if I have it handy or not, but you came on then at about 3:00 that evening, right?

A. Yes, sir.

Q. And what time was this first brought to your attention?

A. When Officer Menkhaus informed me about it sometime after that.

Q. Do you know approximately what time that was?

A. Probably after 4:00.

* * *

Q. Then what did you do when he told you that about 4:00?

A. Well, we decided that after lock-up we would have it checked out, make a search of the cell.

* * *

[7] Q. Is there any reason why you decided to wait until later that evening instead of doing it right away?

A. That's when we have the available manpower. The rest of the institution is secure at that time. Before that, all

the other inmates are out and the officers are assigned to posts in the normal course of activities going on at that time on the second shift.

Q. Was that always your procedure when a shakedown is conducted, to do it at that time?

A. Well, the cell block officers do searches on their own during the course of their time.

Q. Even before lock-up?

A. Right, but that's just generally routine searches that they are doing.

Q. I see. In looking for contraband or whatever?

A. Yes, sir. Or an inmate may tell them there's some drugs or something in so-and-so's cell, and they will go — or contraband or whatever — or just a general search.

* * *

[10] Q. Later on, when you decided it was time to do the search, what did you do then as far as to implement it?

A. After lock-up of the institution in the main cell blocks was completed, the officers come into Menkhaus' office and we informed them that we had to make a search in A-Block. They were given the two inmate's names.

[11] Q. Who were the officers that were in the office?

A. The officers that were sent over were Philip Pence, Joe Burton, Steven Pryor. There was another one — I'd have to look at my report.

Q. And they were in the office there.

A. Yes, sir. And they were instructed that one of these two inmates may have a weapon and we was going to go over there and search for it, and we would search three or four cells.

* * *

[13] Q. Did you give any specific instructions to the men in your office as to how to conduct the shakedown?

A. No, sir. They have been doing searches for a period of time.

Q. Okay. And so you expected that they would go ahead and do the searches the same way.

A. Yes, sir.

Q. I'm not sure — I'm confused. Before, you said that the word to you was that there were maybe two prisoners with weapons.

A. We were given two different names of inmates, that one of those two may have a weapon. They simply said either inmate so-and-so or William Zuern may have a weapon.

Q. Were you going to search two cells over there?

A. Those two plus two others. The reason for that is so that — to protect an informant, so that whoever the informant was — at that time we didn't have any idea who the informant was — so they wouldn't say, "Hey, they knew right where to come to look."

Q. They could trace it right back that way.

A. Yes, sir.

* * *

[14] Q. Did you instruct any of the men who were going over to conduct the search to take any protective devices or weapons with them?

A. No, sir.

Q. Was there any available to them at that time?

A. At that time we had a screen shield if it would [15] have become necessary.

* * *

[16] Q. So what then did you observe when you got over to A-Block then?

A. Just as I started, entered through the gate into A-Block, Deputy Doyle said something to me — I don't recall what it was at the time. He was asking me about something or whatever. Just as I entered into the gate and just as he was asking me, or whatever it was that he had said to me, I heard Deputy Pence holler and I looked down the range and I saw Deputy Pence jump back from the cell — Do you want me to go on?

Q. Yes, sir.

A. I went to where Deputy Pence was standing. When I got there, he was unbuttoning his shirt and pulling his shirt

up to see what had happened. But he was pulling his own shirt up and everything, standing there trying to see what had happened. I don't think he was aware of what had happened. It looked like he had a bruise there. It was a little discolored, like if you would have been punched. So I was going to have him escorted over to see the nurse when he took about maybe two steps and his eyes started to roll back in his head. He started to collapse. We caught him and placed him on the picnic table in the area there.

I immediately called for the nurse, I called [17] S-I Menkhaus, and I called the Turnkey for the life squad.

Q. How long did he remain conscious before he went out?

A. He was still conscious when he left there.

Q. When you took him to the hospital?

A. Yes, he was conscious when he left.

* * *

Q. When you first entered A-Block and heard Phil yell, was he inside or outside of the cell; do you know?

A. The officer never entered the cell. He was outside the cell. The procedure was that they don't enter the cell. Once they open it the inmate steps out. Well, this occurred just as Joe Burton was opening the door. The inmate lunged out before the door was open, with part of his body, and then Joe Burton immediately closed the door back. The inmate got — part of him was outside the cell door and back in, in the [18] amount of time it took Joe Burton to slam the cell door.

* * *

[20] Q. Did you have any conversations with Zuern, yourself, that evening?

A. Before the incident?

Q. Right around when it happened or afterwards.

A. No, sir, because we immediately got the detectives in. I immediately then went to my office. I called for the detectives and I called for the Sheriff and the whole chain of command. And the detectives conducted the interviews.

Now, prior to them getting there, S-I Menkhaus and the nurse retrieved the weapon from Mr. Zuern.

Q. At any time, did you hear Zuern say anything?

A. No, sir. I have never heard one word from Mr. Zuern to this day.

Q. Did you see the weapon that he had used?

A. Yes, sir.

Q. What was the weapon?

[21] A. It was a long piece of metal, about eight inches long, pointed at one end.

Q. Did it have anything at the other end?

A. A round curlicue. I assume he fashioned it on there.

Q. Do you know what he fashioned the weapon from?

A. At the time that the incident happened and when the detectives were doing their investigation, he said it looked like it was maybe a bucket handle. But it was never confirmed that it was a bucket handle.

* * *

P. John F. Douglas

[4] Q. Would you state your name and occupation for the record.

A. John Franklin Douglas. My occupation is Corrections Supervisor II.

* * *

[10] Q. What were the procedures that you followed when there was a report of a weapon, Officer Douglas?

A. Okay. Now, as far as I know, I don't recall any [11] written procedure. I know when they did their training, in training class we were taught that in any type of situation when you go into a cell search, you should consider it being that and look for these types of things. And what one would do is, two people would go to the cell.

Q. When would you do that, go to the cell?

A. I would have done it when I received knowledge that there was such a thing going on, if I had probable cause.

Q. Would you have waited for another shift before going down there to search for a weapon?

MR. HURLEY: Objection.

A. Like I said, it would depend on the circumstances. If it was an almost absolute sure thing, I would not have.

Q. You would not have what?

A. I would not have waited.

Q. Why not?

A. Because I would want to make sure we got it right away.

Q. And if it wasn't a certain thing, could you describe what you deem to be certain?

A. In other words if someone — if an officer came to me and told me straight to my face, "Supervisor Douglas, this man has a weapon. I saw it," that type of situation.

* * *

[15] Q. I assume you have conducted shakedowns of cells, yourself, in your vast experience.

A. Yes, sir, I have.

Q. What procedures do you follow, or did you follow,

prior to the date on which Phil Pence was killed, in conducting such an investigation?

A. I would do one cell at a time, two officers conducting a cell.

Q. You say two officers, two Corrections Officers?

A. Two Corrections Officers.

Q. Who else would be there when they were doing the search? Would the supervisor be there?

A. If one was available.

Q. Okay. And then what would be the rest of the procedure?

A. Okay. One officer would go up to the door, address the inmate, have him to turn and face the wall, inform him of what's going down; such as let him know there is going to be a cell search when you open the door and that you want him to back out the door. And once he did that, after he turned around and backed out of the door, then his person would be searched by the one officer and the other officer would enter the cell, searching from the floor and working his way up.

[16] Q. Would an officer go into the cell while the prisoner was still in the cell?

A. No, sir.

Q. Why not?

A. Because of the size of the cells; they are too small.

Q. And also there could be a weapon hidden there?

A. Yes, sir, there's always that possibility.

Q. Now, is that procedure for an officer not to go into the cell but rather to get the inmate out of the cell?

A. Yes, sir.

* * *

[30] Q. Now, if a person was there on a murder charge, would that automatically put him in the assaultive category?

A. It would automatically put him in A-Block, but it would not automatically put him in the assaultive category. But he would be put in A-Block or maximum security for the reason that he would be considered a prime escape problem.

* * *

Q. Robert J. Brockmeyer

[4] Q. Would you state your name for the record, please.

A. Robert Joseph Brockmeyer.

Q. And what is your occupation?

A. I am a Correction Supervisor III.

* * *

[25] Q. In your experience, was a shank ever used against another guard out there prior to the time Phil was killed?

A. In the 30 years that I was there, it was the first time an officer was ever stabbed.

Q. How about it being used in some other fashion, as far as stabbing?

[26] A. No.

* * *

R. Robert Menkhaus

[4] Q. For the record, would you state your name, please.

A. Robert Menkhaus.

Q. And your occupation?

A. Corrections Supervisor I.

* * *

[10] Q. What time was it that you decided to shake down A-Block?

A. Well, we were not going to shake down A-Block immediately after the information was passed on to us. The way we normally done that was more or less like an unwritten rule in the institution. You secure all the inmates and then put all available manpower over there to do a thorough shakedown, when you are shaking down for weapons like that.

Q. So you deferred the actual shakedown to a later time; is that right?

A. Yes, until we could get more available officers.

Q. When did that occur?

A. When the institution was locked up for the [11] evening, about 10:00 or about a quarter after ten or something like that.

Q. Back at the time you received the information, that was about 3:00 in the afternoon, though?

A. Yes.

Q. And then, so I understand what the procedures are when you shake down an institution, do you mean by that — You tell me what you mean by that.

A. Every inmate is locked in a cell, every single one.

Q. At about 10:00?

A. Yes, and the whole institution is completely secured then.

* * *

[14] Q. So your plan was to wait until that occurrence before going in to shake it down, right?

A. Yes. You can't have any inmate movement when you are shaking down or you're wasting your time. It's too easy

and there's too many hiding places for people to pass things back and forth. There's too many common areas to hide in.

Q. Is it possible, if there's a report of a weapon, to have everyone get back into their cells, even though it's not 10:00 at night?

MR. HURLEY: Objection. You can answer.

A. That was not normally the practice, no. If an officer would have seen someone with a thing — with a definite thing like that, yes. But like I said, the way this information was passed on, there was nothing positive about it. There was nothing out of the norm about it.

Q. But if there had been some specific sighting of a weapon, then there would have been a different procedure?

MR. HURLEY: Objection. You can answer.

A. If you are asking me if an officer would have seen him with a weapon — I'm sure he would have stopped him on the spot.

[15] Q. You said before, if it's just a rumor that there is a weapon, you would wait and do what you did, wait until 10:00 and then shake it down, right?

A. Right.

Q. When would you do otherwise? When would you conduct a shakedown immediately?

MR. HURLEY: Objection. You can answer.

A. Like I said, normally we never do any shakedowns immediately. We secure the whole institution for the evening and then shake it down. That was the normal procedure.

* * *

Q. Did you talk to any Corrections Officers at that point in time or did you wait until later to give instructions?

A. First of all, the two day shift officers, Schweinefus and Fowler, they related the information they had to the second shift officers, which was Doyle and Elam. Now, the other officers myself and Lieutenant York called in the [16] supervisor's office, was Phil Pence and Jim Burton and Gary Roush. And there was one more officer there. I can't remember who the fourth officer was.

Q. You called them in?

A. Yes. We called them in and informed them what we were looking for, that we had some information that some inmate may possibly have made a homemake shank, is what we refer to it as.

* * *

Q. Could you tell me what you told them about the weapons?

[17] A. I told them that we had information, information was passed on from the day shift that some inmates may have fashioned some homemade weapons, and that that's what they were being sent to look for.

Q. Did you name who the inmates were?

A. Yes.

Q. What time was this when you had the conversation with Officer Pence and the other officers?

A. It was about, I'd say about ten after ten, something like that.

Q. P.M.?

A. Yes.

Q. Was that just before the instructions to go out and shake down?

A. Yes.

Q. Did you give the officers any other instructions on how to shake down the cells?

A. No, not at that point. This was something that we did almost on a nightly basis.

* * *

[19] Q. And what are the procedures as far as when there is a shakedown? Who goes over there, how many officers and how many supervisors?

[20] A. Well, we send every available man. That's the purpose of —

Q. So in this case, the available men were the four Corrections Officers?

A. Four were sent over and two were already working there, so there were six.

Q. And then Lieutenant York, and yourself later.

A. Right.

* * *

S. Kenneth W. Schweinefus

[4] Q. Officer Schweinefus, would you state your name for the record, please.

A. Kenneth Wayne Schweinefus.

Q. And your occupation.

A. Corrections Officer II.

* * *

[5] Q. Did you start out with Philip Pence?

A. Yes, sir.

[6] Q. Did you go through training with him?

A. I went through the same type of training; I don't know if we were in the same class.

Q. What type of training did you have?

A. When we originally were hired, we had two days of training, but actually it was an orientation, more or less.

Q. When you say orientation what do you mean?

A. Just introducing us to the place and telling us what we would be doing. The actual training didn't happen for, anywhere from six months to a year after that.

Q. That would have been 1982, on the training?

A. I couldn't give you the exact date; somewhere in there, I really don't know.

Q. And that training was 180 hours?

A. On hundred twenty hours.

Q. Classroom training?

A. Yes, it was.

Q. Did it include on-the-job training, too?

A. Yes, it did.

Q. Was that part of the 120 hours?

A. Yeah. I think we had one day where everybody went to an assigned post.

Q. Other than that, the 120 hours consisted of classroom training?

[7] A. Yes, it did.

Q. Briefly, can you tell me what the categories were in the training that you had?

A. Basically, it covered jail standards, more or less, laws.

We covered the rights inmates had, what rights officers had. You had your search and seizure.

Q. Search and seizure, pertaining to what you could do with inmates?

A. More or less what you can take from them and what you can't take from them basically. And we had a day or two of self-defense. I believe it was two days in Norwood.

Q. Was that physically demonstrating how to handle yourself?

A. How to protect yourself, more or less.

Q. Was there any specific training having to do with shakedowns of cells?

A. Yes, sir, we did have that type of training.

Q. Was that in the classroom training, too?

A. Yes. We also had on-hands of the shaking down of the cell.

Q. You say "on-hands." That means that you went into the cell area?

A. We went to the cell area where no inmates were at the time.

[8] Q. This training, the 120 hours, came after you were with the County for about a year?

A. Somewhere between six months and a year, yes.

Q. Did your training involve the use of weapons for self-protection?

A. No.

Q. Did any of it include the use of protective devices such as a bulletproof vest or shields or —

A. The shield, I believe, was mentioned. As far as the vests, at that time that was something that was up in the air. It was kind of — more or less, what they would say is they weren't concerned about the vests at the time, but they were in the works, discussing those.

* * *

[10] Q. Now, did you know William Zuern prior to the date that Phil was murdered?

A. I knew who he was; I didn't know him personally.

Q. What did you know about his background?

A. Other than the fact that he was in there for a murder charge that he had, nothing else.

Q. And on the day that this happened, June 9, 1984, did you have some contact with an inmate that gave you information that there might be a weapon?

A. Yes, I did.

Q. What was the nature of that contact — First of all, with whom was that contact?

A. That was with Loyal Hearst.

[11] Q. Had you known that inmate before?

A. Yes. I had worked A-Block for a while, so I got to know a few of them.

Q. He was in A-Block?

A. Yes, sir.

Q. What was he incarcerated there for?

A. Honestly, I don't remember.

Q. And did he approach you or what?

A. Yes, he did.

Q. Was anyone with you when he approached you?

A. No.

Q. What did he say when he approached you?

A. I believe I was on the second range —

Q. The second floor of A-Block?

A. Yes. And he asked me to come to his cell, two cell doors down.

Q. What time was this, Officer?

A. The best I can remember, 1:30 or 2:00. I don't know the exact time.

Q. But it was in the afternoon?

A. Correct.

Q. And at that point in time were the cells locked? Were the prisoners locked in the cells?

A. No.

[12] Q. But he was inside his cell or —

A. He was standing in front. His cell door was open.

Q. Was anyone in there with him?

A. No, sir.

Q. When you approached, what did he say?

A. He said he had to tell me something, and he proceeded to tell me about the incident.

Q. Had you ever used him before, for information?

A. No, I had not.

Q. Had you had any other contact with him before?

A. Other than the jail, no.

Q. And you don't know why he approached you? You just happened to be there or —

A. I think he more or less trusted me more than he did Officer Fowler.

Q. Then he proceeded to tell you — What did he say?

A. If I recall, he said that Mr. Zuern had a shank.

Q. Did he tell you what kind of shank it was?

A. No, he just said a shank. We basically took that as what it was. But he told me that he was going to stab someone. He didn't mention who.

Q. When you said, "he was going to stab someone," do [13] you mean Zuern?

A. Yes. And he mentioned, "He wants me."

Q. Meaning?

A. Loyal Hearst. Other than him repeating himself with that, he didn't say anything else. He didn't mention the fact that he was going to stab an officer, just that he had a shank and he was going to stab somebody and, "He wants me."

* * *

T. Charles H. Gibson

[4] Q. Supervisor Gibson, would you state your full name and occupation, please.

A. Charles Hugh Gibson, Supervision I, Hamilton County Sheriff's Department.

* * *

[15] Q. How did the Corrections Officers know what the procedures were?

A. Well, I will tell you from my shakedown experience, I got it from the guys that shook down before. And when I went through the Academy, there were shakedown procedures showed in the Academy.

Q. The training that you received prior to that was on-the-job training, as far as shakedowns and that sort of thing?

A. Yes.

Q. You hadn't gone to the Academy in June of 1984, or had you?

A. I'm not sure either. I don't know the date.

Q. What were the procedures? You have indicated that they were not in writing. What were the procedures in the event of a shakedown of a cell?

A. We always went with at least two people.

Q. Two people?

A. Yes. We always had a backup. And we would just, you know, take the person out. One person would watch him and the other person will shake down the cell.

[16] Q. What would call for a shaking down of a cell?

A. The shakedown of a cell was a routine job. If you worked the block, which I worked numerous times, we shook down cells continuously for contraband. Inmates had a habit of obtaining extra sheets, blankets and things of this nature, and we were constantly removing them. That was part of our job.

Q. If you got specific word that there was a convict, or an inmate had a weapon in their cell, that would be where you had specific knowlege and not just a routine shakedown, was the procedure the same?

A. Yes. The procedure was that you always had a backup, at least two guys.

* * *

[18] Q. To your knowledge, what was the procedure that was in place at the Correctional Institute when there was a shakedown of a cell, with regard to the use of weapons?

A. It was the same procedure that we used for a regular shakedown.

Q. And what was that?

A. We would have a backup officer. We would take the man out of the cell. One man would watch the inmate while [19] the other man did the search.

Q. Would they take any weapons with them? Was the procedure for the Corrections Officers to take any weapons with them?

A. It depended on how accurate the information was. If someone seen the weapon, we had what we call a shield that we could have taken in with us.

* * *

[20] Q. Now, given that information, would this have been a situation where it would be appropriate to take a weapon or a shield of some kind down to the cell to do a shakedown?

MR. HURLEY: Objection.

A. In my past experience of getting tips on weapons, most of them do not pan out. You're not going to find a weapon. They don't hold a weapon. They put them somewhere outside the cell and is you shake it down a hundred times you are not going to find anything. They just don't hold it, is what it is.

Q. Did you know Inmate Hearst?

A. No.

Q. You don't know how reliable an informant he is?

A. They use this tactic to throw heat on another inmate that they don't like so you will go and rip up their cell.

Q. In your opinion, you wouldn't know whether this would be a situation where it would call for the taking of weapons?

A. I would have to know Hearst and the relationship between those two guys.

[21] Q. The reliability and so on.

A. Right. I have shook down numerous times and found numerous weapons, and they are all outside. They don't hold them.

* * *

[22] Q. How often would there be a shakedown of a cell?

A. Shakedowns were done routinely, daily, by the Block Officers, Miscellaneous Officers, when they didn't have anything to do. Shakedowns were a part of the job.

Q. That would be done at different times? They wouldn't do it on a schedule, obviously.

A. No.

Q. What about other than the routine shakedowns? How often were they done?

A. This was quite a common occurrence. They use is as a tactic on one another.

Q. Can you give me some idea?

A. When I worked the Block, there was four or five requests a day to shake a guy down. He'd say: "You stole my radio."

Q. I mean as far as weapons.

A. I always treated every cell as if there was a weapon in it.

* * *

[24] A. If I knew which one individual probably had a weapon, I would get all the manpower I could and I would take the shield or shields and the sticks, if I knew positively that there was a weapon, and I would handle the situation.

Q. When you say all the manpower you could get, you would get anybody —

A. Anybody that I could pull free without jeopardizing the security of my institution.

* * *

[37] Q. Did you specifically make any complaints to your supervisor, Officer Gibson, about trying to control this weapon problem?

A. No, because in my opinion, we were controlling it. Like I say, most of them were made to control me and my officers, okay, as far as trading. Sure, I went in and I was cautious, but I never did feel that they were a threat to me. They were never used on an officer.

Q. You never thought that it was a threat. You thought they were used for attention or — but not to harm you —

A. Or for favors.

Q. Was it the same way in A-Block?

A. Truthfully, I haven't found that many in A-Block. The Main Block was the big — that's where the mass of the people were. So you would have more weapons. In A-Block, the years that I shook down, if I found one or two weapons, I was [38] doing great.

Q. In A-Block.

A. Yes.

Q. Were there any special precautions taken in A-Block in checking on weapons?

A. It was routine. It was — a shakedown was done routinely every day by an officer.

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